A TREATISE

ON THE

LAW OF IRRIGATION

COVERING
ALL THE STATES AND TERRITORIES

WITH AN

APPENDIX OF STATUTORY LAW

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PREFACE.

In this volume I have endeavored to present, concisely and yet fully, the American law of irrigation. My aim has been to state the law as it is rather than the law as it should be. It would have been easier to make a larger book by including in the text long extracts from judges' opinions, as is sometimes done, leaving the reader to work out the law for himself from this mass of material, but I have preferred to give instead the result of my own study of the cases. This course has meant more work for myself, but, I hope, not without a corresponding increase in the usefulness of the book.

A conscientious attempt has been made to cite all the cases on the subject, and I believe the collection is practically complete. Except where otherwise noted, only irrigation cases have been included. Cases from other branches of the law of water rights might frequently have been cited in support of the text, but so far as possible I have chosen to confine myself strictly to the subject indicated by the title of the work. But although this book treats of the law of irrigation only, it may be not without interest to those concerned with other phases of the general subject of water rights, for in many respects the law is the same, whatever the particular use to which the water is put. This is especially true of the doctrine of appropriation, which is fully treated in this work.

In the Appendix the full text of the irrigation statutes of general interest and application has been given, with the substance of or reference to other statutes pertaining to the subject.

I desire to acknowledge my indebtedness to the Hon. John F. Shofroth, M. C., for his courtesy in securing for me valuable government publications; to the Edward Thompson Company, publishers of the American & English Encyclopedia of Law, for permission to make certain use of an article on irrigation law prepared by me for that work; and especially to Mr. Joseph H. Eaton, of the Denver bar, who has read the entire work in manuscript, and made many helpful and valuable suggestions.

J. R. L.

Denver, Colorado, November 1, 1900.

IX

TABLE OF CONTENTS.

CHAPTER I.

INTRODUCTORY.

§ 1. Definition of Irrigation.
2. Necessity for Irrigation.
3. Irrigation as a Natural or Artificial Want.
4. Use of Water for Irrigation as a Public Use.
5. Rise and Growth of Irrigation Law.
6. Two Systems of Irrigation Law.
7. Scope of Present Work.

CHAPTER II.

THE DOCTRINE OF RIPARIAN RIGHTS.

§ 8. Scope of Present Chapter.
9. General Statement of Doctrine of Riparian Rights.
10. In What States in Force.
11. Right of Riparian Owner to Use Water of Stream for Irrigation.
12. Nature of Right.
13. Right Limited to Riparian Lands.
14. What Lands are Riparian.
15. Measure of Right—Use must be Reasonable.
16. What is a Reasonable Use.
17. No Right to Use Entire Flow of Stream.
18. Relative Rights of the Several Proprietors.
19. Return of Surplus Water to Channel.
20. Point of Diversion and Return.
21. Right to Water Artificially Developed.

CHAPTER III.

THE DOCTRINE OF APPROPRIATION.

I. The Right of Appropriation.

§ 22. Acquisition of Water Rights by Appropriation.
23. Origin of the Doctrine of Appropriation.
24. Constitutionality of Statutes Authorizing Appropriation.
25. Extent of Application of the Doctrine of Appropriation in the Several States.

II. Appropriation under Acts of Congress.

26. Appropriation of Water on the Public Domain.
27. How Existence of Water Right on Public Domain is Determined.
28. Relative Rights of Appropriator of Water and Grantee of Land.
29. Same—Appropriation Subsequent to Grant.
30. Same—When Rights of Grantee Attach.

III. What Water may be Appropriated.

31. General Statement—Natural Streams Subject to Appropriation.
32. What Constitutes a Stream or Watercourse.
33. Percolating Waters and Subterranean Streams.
34. Navigable Streams.

IV. Who may Appropriate Water.

35. Who may Appropriate Water.

V. How Water is Appropriated.

36. The Elements of a Valid Appropriation.
37. Notice of Appropriation—Posting and Recording Notice.
38. Same—What is a Sufficient Notice.
39. Same—Appropriation Without Posting of Notice.
40. Filing Map and Statement of Appropriation.
41. Diversion of Water—Water must be Diverted Within a Reasonable Time.

42. Same—Modes of Diverting and Conducting Water.
43. Same—Use of Natural Channel or Ravine as Part of Ditch.
44. Same—Use of Ditch Constructed by or Belonging to Another.
45. Same—Diversion must be with Intent to Use Water for a Beneficial Purpose.
46. Same—Change of Point or Means of Diversion.
47. Application of Water to Beneficial Use—Water must be Used Within a Reasonable Time.
48. Same—Gradual Application through Successive Seasons.
49. Same—Methods of Applying Water.
50. Same—Place of Use.
51. The Doctrine of Relation.

VI. The Right Acquired by Appropriation.

52. The Doctrine of Priority.
53. Priority between Appropriators Using Water for Different Purposes.
54. Quantity of Water That may be Claimed—General Principles.
55. Same—How Far Determined by Capacity of Ditch.
56. Same—Water must be Used in a Reasonable Manner.
57. Same—Appropriation of Entire Flow of Stream.
58. Same—Surplus Water.
59. Same—Enlargement or Extension of Use.
60. Right to Flow of Tributaries.
61. Use of Water by Periods.

CHAPTER IV.

RIGHT OF WAY FOR DITCHES AND CANALS.

§ 62. Generally—Condemnation of Right of Way.
63. Condemnation of Right of Way—Right of Condemnation Limited.
64. Same—Enlargement of Ditch Already Constructed.
65. Same—Assessment of Damages.
66. Right of Way Over Public Lands.
67. Right of Entry for Construction and Maintenance of Ditch.

CHAPTER V.

LIABILITY FOR DAMAGES CAUSED BY CONSTRUCTION AND USE OF DITCHES.

§ 68. General Rules as to Liability of Ditch Owner for Damages.
69. Liability of Irrigation Companies Owning Ditches.
70. The Doctrine of Contributory Negligence.
71. Bridging Ditches Crossing Highways and Streets.

CHAPTER VI.

PROPERTY IN WATER RIGHTS AND DITCHES.

§ 72. General Doctrine as to Property in Water Rights.
73. Water Rights as Appurtenances to Land.
74. Property in Ditches and Canals.
75. Co-Ownership of Ditches and Water Rights.
76. Taxation of Ditc hes and Water Rights.

CHAPTER VII.

TRANSFER OF WATER RIGHTS.

§ 77. Generally—Water Right may be Sold or Otherwise Transferred.
78. Conveyance of Water Right with Land.
79. Conveyance of Water Right Separate from Land.
80. Formalities of Conveyance.
81. Contracts and Licenses Affecting Water Rights.

CHAPTER VIII.

ABANDONMENT, ADVERSE USER AND ESTOPPEL.

§ 82. Abandonment—Loss of Water Right by Abandonment or Nonuser.
83. Same—Abandonment and Nonuser Distinguished.

84. Same—Abandonment of Ditch without Abandonment of Water Right.
85. Same—What Constitutes Abandonment.
86. Same—Transfer of Water Right as Abandonment.
87. Same—Proof of Abandonment.
88. Adverse User—Water Right may be Acquired by Adverse User.
89. Same—Acquisition of Water Right by Appropriation and by Prescription Contrasted.
90. Same—User must be Adverse—What Constitutes Adverse User.
91. Same—User must be Continuous.
92. Same—Proof of Adverse User.
93. Same—No Adverse User as Against the United States.
94. Estoppel—Water Right Lost by Estoppel.

CHAPTER IX.

THE ADJUDICATION OF PRIORITIES.

§ 95. General Jurisdiction of Courts to Adjudicate Water Rights.
96. Determination of Quantity of Water to be Awarded.
97. The Decree—Certainty and Definiteness Required.
98. The Doctrine of Res Judicata.
99. Statutory Adjudication—Colorado System—Generally.
100. Same—Jurisdiction of Courts.
101. Same—The Decree.
102. Same—Proceedings before Referee.
103. Same—Review and Appeal.
104. Same—Independent Action.
105. Same—Some Observations on the Colorado System.
106. Statutory Adjudication—Wyoming System.
107. Statutory Adjudication—Washington, Nebraska, Montana, Utah and Oregon.

CHAPTER X.

ACTIONS FOR INTERFERENCE WITH WATER RIGHTS.

§ 108. Generally.

109. Action for Diversion of Water—Generally.
110. Same—Who may Maintain Action.
111. Same—Joinder of Actions and Parties.
112. Same—Independent Diversions by Several Defendants.
113. Same—Plaintiff's Rights must be Invaded—Proof of Damages.
114. Same—Jurisdiction of a Court of Equity.
115. Same—Pleading.
116. Action to Quiet Title.
117. Pollution of Water.

CHAPTER XI.

THE STORAGE OF WATER.

§ 118. Generally.
119. Liability of Reservoir Owner for Damages Caused by Reservoir.

CHAPTER XII.

PUBLIC CONTROL OF IRRIGATION.

§ 120. Generally.
121. In Colorado.
122. In Wyoming.
123. In Other States.

CHAPTER XIII.

IRRIGATION COMPANIES.

§ 124. Generally.
125. Acquisition of Water Rights—Generally.
126. Same—Appropriation by Irrigation Companies.
127. Same—Condemnation of Water Rights.
128. Acquisition of Right of Way.

129. By-Laws and Regulations.
130. Irrigation Companies Public Carriers of Water.
131. Duty to Furnish Water to Consumers.
132. Contracts for Water Rights.
133. Rates for Furnishing Water.
134. Transfer of Stock in Irrigation Companies.

CHAPTER XIV.

IRRIGATION DISTRICTS.

§ 135. Generally.
136. Organization of District.
137. Corporate Nature of Irrigation Districts.
138. Powers and Duties of Board of Directors.
139. Issuance of Bonds and Levy of Assessments.

CHAPTER XV.

THE DESERT LAND ACTS.

§ 140. The Acts of Congress.
141. The State Statutes.

LAW OF IRRIGATION.

CHAPTER I.

INTRODUCTORY.

§ 1. Definition of Irrigation.
2. Necessity for Irrigation.
3. Irrigation as a Natural or Artificial Want.
4. Use of Water for Irrigation as a Public Use.
5. Rise and Growth of Irrigation Law.
6. Two Systems of Irrigation Law.
7. Scope of Present Work.

§ 1. Definition of Irrigation.

The term "irrigation," in its primary sense, means any act of watering or moistening, yet, in common parlance, its meaning is ordinarily restricted to the watering of lands for agricultural purposes.[1] In the sense in which the term is employed in the present work, "irrigation" may be defined to be the application of water to land by artificial means for the raising of crops and other products of the soil.[2] This definition, it will be noted, contemplates the watering of land by artificial means, and not by rainfall, or

[1] See Cent. Dict.

[2] Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. 711; Paxton & Hershey Irr. Canal & Land Co. v. Farmers' & Merchants' Irr. & Land Co., 45 Neb. 884, 64 N. W. 343.

the natural overflow of streams, though possibly the cultivation of land by means of water naturally moistening and rendering it productive by natural overflow may amount to a valid appropriation of such water.[3] The term does not, however, mean the conveyance or application of the water by any particular means, as by ditches, necessarily. The method by which irrigation is effected has nothing to do with the meaning of the word.[4]

A water right is the legal right to use water.[5]

§ 2. Necessity for Irrigation.

In Great Britain and the eastern states, where the climate is moist, the natural rainfall abundant, and the land supplied with numerous springs and flowing streams, the necessity for artificial irrigation can rarely arise. The concern of the farmer is often not so much how to supply his crops with a sufficient quantity of water, but how he may dispose of the surplus water already so abundantly supplied by nature. But in that part of the United States known as the "arid region," comprising a large portion of the country west of the Missouri river, a very different condition of affairs prevails. In this region the soil, though of great fertility, is, for the most part, wholly unproductive on account of the lack of water. Tracts of land of vast extent, which, with a sufficient supply of water, would be productive to bountifulness, lie practically desert, producing nothing but sagebrush and cactus, with here and there a ragged fringe or struggling cluster of cottonwoods along the infrequent

[3] See Thomas v. Guiraud, 6 Colo. 530.

[4] Charnock v. Higuerra, 111 Cal. 473, 44 Pac. 171. See post, §§ 42, 49.

[5] Smith v. Denniff (Mont., 1900) 60 Pac. 398.

streams. In this region, agriculture is often absolutely impossible without the aid of irrigation. This condition of the country, and the imperative necessity for irrigation to render it productive, is a matter of common knowledge, of which the local courts will take judicial notice.[6]

The western states with respect to their climatic condition as to moisture may be divided into the "arid region," strictly so-called,—that is, the region in which irrigation is absolutely essential to the successful cultivation of the soil,—and the "subhumid region," in which the rainfall is in some seasons sufficient, and in other seasons insufficient, for agricultural purposes. The arid region embraces, either wholly or in part, the following states and territories, namely: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. Of course, some of these are much more completely arid than others; some, as Arizona and New Mexico, being very largely so, while others, as the states on the Pacific coast, are, as to a great part of their area, especially on the western slopes of the mountains, naturally well watered. No state is wholly arid. The subhumid region embraces parts of Kansas, Nebraska, North and South Dakota and Texas.[7]

The distinction here made between the "arid" and "subhumid" regions, so far as the employment of these specific terms is concerned, will not be observed in the course of this work, but the term "arid region" will be used to denote

6 Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540; Mud Creek Irr., Agr. & Mfg. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635.

7 See Census Report of Agriculture by Irrigation, 1890, pp. vii., 257.

generally all the states above enumerated as constituting both regions.

§ 3. Irrigation as a Natural or Artificial Want.

The water of a stream may be useful to a riparian proprietor to quench the thirst of man or beast, and for household and domestic purposes. Again, it may be useful for purposes of agriculture, mining, manufacturing or other industrial pursuits. These various wants have been sometimes divided into two general classes,—natural, or, as they are sometimes designated, ordinary, wants, and artificial, or extraordinary, wants; the natural or ordinary wants being primary wants, absolutely necessary to be supplied, such as those first above enumerated, and the artificial or extraordinary wants being secondary, and such as are simply for the comfort, convenience or prosperity of the proprietor, these latter being held to be subordinate to the former.[8] The use is, of course, natural or artificial, according as it is to supply a natural or an artificial want. To the latter class, the use of water for industrial purposes has been usually assigned.

It is generally conceded that a riparian proprietor may use the water of a stream for any of the purposes named, provided his use of the water for such purpose be reasonable. The difficulty has been to determine what is a reasonable use in each case. It seems that it was in the attempt to establish a practical rule by which to determine this question for each particular case that the above classification was

[8] Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,-371.

adopted. It was considered that the necessary use of water to supply natural or ordinary wants, without regard to the effect of such use upon lower proprietors in case of deficiency, was reasonable; while with reference to the artificial or extraordinary uses, the effect of the use on those below must always be considered in determining its reasonableness.[9] Obviously, if this distinction be accepted as law, it is of prime importance to determine to which class any particular use of water belongs, as this will have a most important bearing on the question of how much water may be consumed in such use.

There are but few cases in which the question as to whether the use of water for irrigation is a natural or artificial use has been directly raised. Before proceeding to the examination of these cases it should be noted at the outset that the above classification was first made in early cases in jurisdictions where, and at a time when the subject of irrigation was of little importance, and had therefore been rarely considered by the courts. The opinions of the judges in these cases seem to have been, for the most part, simply adopted without question in later cases as a correct statement of the law, and the matter has received very little attention as an original proposition to be examined in the light of the changed conditions under which the later cases were to be decided. It may be helpful, also, to consider the logical consequences that must follow if irrigation be considered a natural or ordinary want, as above defined, so as to determine from these the real attitude of the courts, as shown by their

[9] See Miner v. Gilmour, 12 Moore, P. C. 131; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Evans v. Merriweather, 3 Scam. (Ill.) 496, 38 Am. Dec. 106.

actual decisions, rather than by the statements, sometimes made without reflection, to be found in the opinions of the judges.

As stated above, the rule established by judicial opinion is that a riparian proprietor may supply his natural or ordinary wants from a stream, without regard to the needs of lower proprietors,—that is, of course, to say, he may even consume the entire flow of the stream, provided this may be necessary to supply his own wants. In using the water for supplying his artificial or extraordinary wants, however, he must consider the effect of such use on lower proprietors, and, of course, cannot consume all the water, for this would wholly deprive them of the use of the stream. A decision that a riparian proprietor may use all the water for irrigation is, in effect, a decision that the use of water for irrigation is a natural or ordinary use. A contrary decision is, in like manner, a decision that such use is artificial or extraordinary.

We will now examine the cases bearing on this question: In England and in the eastern states, as might naturally be expected from the climatic conditions there obtaining, the use of water for irrigation is regarded as an artificial or extraordinary use.[10] In that part of the arid region in which the doctrine of riparian rights is in force, the authorities are directly conflicting. In Texas it is declared that the use of water for irrigation in the arid portions of the state is an ordinary or natural use, and that the entire flow of a

10 See Miner v. Gilmour, 12 Moore, P. C. 131; Evans v. Merriweather, 3 Scam. (Ill.) 496, 38 Am. Dec. 106; Garwood v. New York Cent. R. Co., 83 N. Y. 400.

stream may be consumed in such use when necessary.[11] The correctness of this view was denied in an early case in the United States circuit court, in which it was contended that, so far as the classification of the use of water for irrigation is concerned, there can be no difference in the law in moist and in dry climates, though the greater necessity of irrigation in dry countries may be a proper fact to consider in determining the question of reasonable use.[12]

The most satisfactory view of the question is perhaps that taken by the supreme court of California in a recent leading case, in which the court, after expressing a doubt as to

11 Rhodes v. Whitehead, 27 Tex. 304; Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540; Mud Creek Irr., Agr. & Mfg. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078; Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 758. The earlier contrary decision in Fleming v. Davis, 37 Tex. 173, is overruled by the later cases just cited. See, also, the dictum in Evans v. Merriweather, 3 Scam. (Ill.) 496, 38 Am. Dec. 106.

The Texas doctrine, established as to the arid portion of the state by the decisions just cited, should be qualified as to other parts of the state. Thus in Baker v. Brown, 55 Tex. 377, the court says: "Although it may be difficult to always draw with precision the line which may divide these two classes [natural and artificial uses of water], yet it is abundantly supported by authority that the right to irrigate, when not indispensable, but used simply to increase the products of the soil, would be subordinate to the right of a coproprietor to supply his natural wants and that [those] of his family, tenants, and stock,—as to quench thirst, and the right to use the water for necessary domestic purposes."

12 Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371. In Oregon, the court in Low v. Schaffer, 24 Ore. 239, 33 Pac. 678, said: "A diversion of water for irrigation is not an ordinary use, and can only be exercised reasonably, and with proper regard to the rights of other proprietors to apply the water to the same purposes." Citing Gould, Waters, § 205; Pomeroy, Riparian Rights, § 125.

whether any arbitrary classification of general application can be made, pointed out the fact that the relative importance and necessity of the several uses of the water of a particular stream will generally depend entirely upon the circumstances of each case, and that all these circumstances are to be considered in determining the reasonableness of the use for irrigation.[13]

In several later cases in this state it has been held that the right to the use of water for irrigation must be held in subordination to the right of other proprietors to use the water for domestic purposes, and for drink for man and beast, these latter wants being designated as their "natural" wants, which must be supplied before water can be taken for irrigation.[14] In view of the well-settled principles now established as to the extent of the right of a riparian proprietor to use water for irrigation purposes, any further attempt to define such use as a natural or artificial one would seem superfluous. Practically, however, it may be regarded as settled in the arid region that such use is artificial or extraordinary, for it has several times been held that a riparian proprietor has no right to use the entire flow of the stream for irrigation; and although dicta may be found to the contrary, there is no actual decision to that effect, and it seems improbable, especially in view of the cases holding the other way, that any such decision will hereafter be rendered.[15]

13 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

14 Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217; Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 45 Pac. 160, 54 Am. St. Rep. 337; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725.

15 See post, § 17.

In those states in which the doctrine of riparian rights has been repudiated, the present question has not arisen, but the absolute necessity for irrigation has been universally recognized. As will be shown later, however, in several states the relative preference to be given to the several uses of water is determined by constitutional provisions.

§ 4. Use of Water for Irrigation as a Public Use.

It may frequently be necessary, especially in connection with the exercise of the right of eminent domain for the purpose of securing water rights, or the right of way for ditches, etc., to determine the character of the use of water for irrigation as a public or private use. The general rule is, of course, well settled, that private property cannot be taken, without the consent of the owner, for a private use. It is to be noted, however, that there is no prohibition in the federal constitution which acts upon the states in regard to their taking private property for any but a public use.[16] A state may, therefore, by its constitution, provide for the taking of private property for private uses, as has been done in several instances,[17] but, in the absence of any such constitutional provision, private property cannot be so taken.[18]

It is a question of vital importance, therefore, to determine whether the use of water for irrigation is to be regarded as public or private. The matter is, in several states, settled by the state constitutions by provisions differing somewhat in breadth of terms. In Washington it is declared generally that the use of the water of the state for irrigation,

16 Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112.

17 See Const. Colo. art. 2, § 14; Const. Wyo. art. 1, § 32.

18 Cooley, Const. Lim. (6th. Ed.) p. 651; Lewis, Em. Dom. § 157.

mining, and manufacturing shall be deemed a public use.[19] In California, the use of all water appropriated "for sale, rental, or distribution," is declared to be public.[20] In Montana, the use is public where the water is appropriated "for sale, rental, distribution, or other beneficial use."[21] The Idaho provision is the same as that of California, with the addition that the use of "all water originally appropriated for private use, but which, after such appropriation," has been or may be sold, rented, or distributed, is public.[22]

In California it seems that the use of water by an individual primarily for the irrigation of his own lands is a private use, although it is the intention that some of the water diverted shall be supplied to others for mining and agricultural purposes.[23] In Montana this view is rejected, and it is held that it is immaterial, so far as the public nature of the use is concerned, whether the land to be reclaimed by irrigation is a small tract, belonging to one person, or a large body of land, owned by many different persons.[24] With reference to this ruling, it is submitted that the position taken is at least questionable as a matter of principle, and

19 Const. art. 20, § 1.

20 Const. art 14, § 1.

21 Const. art. 3, § 15.

22 Const. art. 15, § 1.

23 Lorenz v. Jacob, 63 Cal. 73. In this case, the plaintiffs commenced proceedings under Code Civ. Proc. § 1238, to condemn lands belonging to the defendant for the construction of a ditch. It appeared that the plaintiffs' main object was to use the water for working their own mining claims, and that they incidentally intended to supply others with water for mining and agricultural purposes. It was held that the use contemplated was private, and that the defendant's land could not be taken for such purpose.

24 Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757. In this case, the defendant appealed from a decree establishing a right of way

that the decision of the California court is more in accord with the general rules of law as to what constitutes a public use.

The question whether the use of water for irrigation is a public use was considered in a recent case in the United States supreme court. The precise question raised in this case was whether the California act providing for the establishment of irrigation districts is unconstitutional; its constitutionality having been questioned on the ground that it authorized the taking of private property for a private use. The court sustained the act, and held the use of water for irrigation, provided for therein, to be a public use. Special

across his lands in condemnation proceedings instituted by the plaintiff and another under the Montana act of March 6, 1891. In affirming the decree, Buck, J., said: "In California, whose constitutional provision on the subject of the use of water, it is insisted by appellant, is substantially the same as that of Montana, a much narrower interpretation of the term 'public use' has been adhered to than we can agree with. [Setting forth Lorenz v. Jacob, 63 Cal. 73, stated above.] And yet, in the state of California, no constitutional objection is urged against the construction of ditches and condemnation of rights of way therefor in order to distribute water to a number of owners of agricultural or mining lands. What real distinction is there, so far as the term 'public use' is concerned, between the benefit that results to a state from the reclamation by artificial irrigation of 160 acres of agricultural land owned by one or two persons, and the reclamation, by the same means, of thousands of acres owned by many different persons living together in one subdivision of the state? We do not think there is any in principle. The reclamation of one small field by means of artificial irrigation promotes the development and adds to the taxable wealth of the state. The only difference is the extent of the benefit. The constitutional provision of California, however, is not the same as that of Montana on the subject of the use of water. The former does not contain the phrase 'other beneficial use.' But even if this phrase were not included in the Montana provision, we should not

stress was laid in the opinion upon the necessity of the use irrespectively of the number of persons interested, as constituting a controlling factor in the decision of the question; it being held that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use.[25]

In Colorado and Wyoming it would appear that the framers of the constitution in these states regarded the use of water for irrigation by an individual as a private use,[26] and this seems clearly in accord with the weight of both reason and authority. It is settled by all the authorities that the use of water for irrigation, when distributed by an irrigation company, is a public use.[27] In general, whether the use of water for irrigation by a number of persons is to be regarded

feel disposed to follow the California construction. It impresses us as narrow and unprogressive. Under this language in the constitution of each state, namely, 'the appropriation of water for distribution,' we think the courts of either state would be justified in declaring the use of water for one or two tracts of land or mines a 'public use.' "

25 Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112.

26 This seems to follow by implication from the provision that "private property shall not be taken for privtae use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches, on or across the lands of others for agricultural * * * purposes." Const. Colo. art. 2, § 14; Const. Wyo. art. 1, § 32.

27 Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112; Atlantic Trust Co. v. Woodbridge Canal & Irr. Co., 79 Fed. 39; San Diego Flume Co. v. Souther, 90 Fed. 164; Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802; Paxton & Hershey Irr. Canal & Land Co. v. Farmers' & Merchants' Irr. & Land Co., 45 Neb. 884, 64 N. W. 343; Umatilla Irr. Co. v. Barnhart, 22 Ore. 389, 30 Pac. 37.

as a public use will depend upon the facts and circumstances of the particular case.[28]

It is provided by statute in California that the right of eminent domain may be exercised in behalf of certain enumerated "public uses," including canals, ditches, etc., for public transportation, supplying mines and "farming neighborhoods" with water.[29] This is held to be a legislative declaration that the supplying of water to a farming neighborhood is a public use, and falls within the scope of legislative duty in providing for the public welfare. A "farming neighborhood," in the sense of this statute, is defined as a region in which there are several tracts of farming land, with a proximity of location, and which can be regarded as a whole with reference to some common interests, although they are distinct in boundaries, and held in individual proprietorship. Its extent need not be characterized by fixed boundaries, nor its existence determined by any definite number of proprietors; and while a tract of land, though large in extent, might, if held in different proprietorships, constitute a neighborhood, yet it would not, if it were held in single ownership. The supplying of water to a tract of agricultural land, though of many thousand acres in extent, if occupied by an individual proprietor, would, it seems, be for his private benefit, and not a public use; yet the same tract of land might be so subdivided and held in individual proprietorship as to render the supplying of water to it a public instead of a private use. It is not necessary that the entire public shall enjoy

[28] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112; Oury v. Goodwin (Ariz., 1891) 26 Pac. 376; Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802.

[29] Code Civ. Proc. § 1238.

the use, or even that it be capable thereof, but the use must be capable of enjoyment by all who may be within the neighborhood, and there must be within that neighborhood so great a number of the entire public as to destroy its character as a private use.[30]

Whether a particular region is a farming neighborhood, and whether the supplying of water to that neighborhood constitutes a public use, are questions of fact.[31]

§ 5. Rise and Growth of Irrigation Law.

As would naturally be expected from the circumstances considered in a previous section, the modern law of irrigation is almost entirely a product of the western courts and legislatures. There being almost no necessity for irrigation in Great Britain and the eastern states, there has, of course, been very little litigation on the subject, and the cases in which it has been considered are extremely few, while legislation on the subject would be entirely superfluous. On the other hand, in the arid region, where the farmers, from the first settlement of the country, have been compelled to resort to irrigation, many questions as to their relative rights as irrigators have arisen and been determined by the courts, or have been made the subject of statutory enactments. Already a large number of irrigation cases have been decided, beginning with the judicial history of the several states and territories, and the number of such cases is rapidly increas-

[30] Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802. See, also, Oury v. Goodwin (Ariz., 1891) 26 Pac. 376.

[31] Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802. See, also, Lux v. Haggin, 69 Cal. 255, 304, 10 Pac. 674; Aliso Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537.

ing. At the same time, a great body of statute law has arisen on the subject.

When it is said that the number of irrigation cases decided by other than western courts has been small, it must not, however, be understood that these cases have played an unimportant part in the development of irrigation law. On the contrary, it will be found that one of the two great systems of irrigation law presently to be noticed is based almost entirely upon the principles announced in these cases, and is little more than a development of the law as established by them, with such modifications and additions as have been found necessary in adapting the common-law doctrine of riparian rights to the peculiar conditions existing in the arid states.

§ 6. Two Systems of Irrigation Law.

While the absolute necessity for irrigation has been recognized in all the arid states, two different views prevail as to the nature and extent of the rights of the irrigator growing out of this necessity. The result is that two entirely distinct systems of irrigation law have grown up side by side in the arid region, based upon principles fundamentally different, yet overlapping each other in many important details. The older system, which has prevailed from an early date in California, and which may be called the "California system," rests upon the common law of riparian rights. The other system, which originated in California, but which was first applied to private lands in Colorado, and is therefore known as the "Colorado system," is based upon an entirely new principle in the law of water rights, known as the doctrine of "appropriation." One or the other of these two systems has been adopted in all of the other arid states.

In this work, the two systems will first be discussed separately, so far as this may be necessary to bring out the peculiar features of each, but in the treatment of questions that may arise in the case of either, they will be considered together, such distinctions being made as occasion may require. The points of resemblance and difference between the rights of the irrigator under the two systems will thus be brought out in the course of the work.[32]

§ 7. Scope of Present Work.

While it might be interesting and instructive, as a matter of general information, to consider the subject of irrigation in Egypt, in India, and in other parts of the world, in ancient and in modern times, this is a matter entirely foreign to the purpose of the present work, which will be confined to the discussion of irrigation in its legal aspect as a branch of American law, with no further reference to the historical, scientific or descriptive phases of the subject than may be necessary to an intelligent understanding of it as a matter of legal interest.

[32] The rights of the irrigator at common law and under the Colorado constitution are well contrasted in the opinion of Elliott, J., in Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854.

CHAPTER II.

THE DOCTRINE OF RIPARIAN RIGHTS.

§ 8. Scope of Present Chapter.
9. General Statement of Doctrine of Riparian Rights.
10. In What States in Force.
11. Right of Riparian Owner to Use Water of Stream for Irrigation.
12. Nature of Right.
13. Right Limited to Riparian Lands.
14. What Lands are Riparian.
15. Measure of Right—Use must be Reasonable.
16. What is a Reasonable Use.
17. No Right to Use Entire Flow of Stream.
18. Relative Rights of the Several Proprietors.
19. Return of Surplus Water to Channel.
20. Point of Diversion and Return.
21. Right to Water Artificially Developed.

§ 8. Scope of Present Chapter.

As pointed out in a preceding section, there are two different systems of irrigation law, based respectively upon the common-law doctrine of riparian rights, and what is known as the doctrine of "appropriation." It is proposed in the present chapter to discuss the former system in so far as it is an essentially distinct system from the other. In presenting the doctrine of riparian rights, no general discussion of the subject, other than may be necessary to a complete understanding of the doctrine as applied in the law of irrigation, will be attempted. This branch of irrigation law was, in the first instance, derived mainly from cases involving other phases of the law of riparian rights, and in former times, when the number of irrigation cases was very small,

and the rights of riparian proprietors were therefore determined mainly in cases where other uses of water were involved, it was necessary to consider such cases in order to determine the rights of the riparian proprietor as an irrigator. But at the present time, when such rights are thoroughly well settled by decisions in which the precise point was presented, it will be neither profitable nor necessary, in a work of this character, to examine cases involving other water rights, although the principles established thereby are applicable also to the use of water for irrigation. In this discussion, therefore, only irrigation cases will be included, except where the contrary is plainly indicated by the context, or otherwise.

In reading this chapter it should be borne in mind that it deals exclusively with the law of irrigation according to the doctrine of riparian rights, and the statements made, although they may be sometimes general in form, should not be understood as applying beyond the scope of the present chapter.

§ 9. General Statement of Doctrine of Riparian Rights.

The right of a riparian proprietor to use the water of a stream for irrigation is but one of his rights in respect to the water of the stream, and the law governing the exercise of this right is but one branch of the general law as to the right of such proprietor to the flow and use of the water. A brief statement of this general law may therefore be helpful to an intelligent study of the rights of a riparian proprietor as an irrigator.

The general doctrine as to the right of a riparian proprietor to the flow and use of the water of a stream flowing through or bordering on his land may be stated as follows:

Every proprietor of land on the banks of a natural stream has an equal right to have the water of the stream continue to flow in its natural course as it was wont to run, without diminution in quantity or deterioration in quality, except so far as either of these conditions may result from the reasonable use of the water for irrigation or other lawful purposes by upper proprietors. He may himself use the water for necessary purposes in a reasonable manner, having due regard to the rights and needs of other proprietors, provided he returns to its natural channel, before it leaves his estate, all the water not necessarily consumed in his own lawful use.[1] The right of the riparian owner is limited to a simple usu-

[1] Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,-371; Union Mill & Min. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. 14,-370; Ferrea v. Knipe, 28 Cal. 340; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577; Elliott v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Vansickle v. Haines, 7 Nev. 249; Hayden v. Long, 8 Ore. 244; Coffman v. Robbins, 8 Ore. 278; Rhodes v. Whitehead, 27 Tex. 304.

The following passage from Chancellor Kent (3 Kent, Comm. 439) has met with universal approval as a correct statement of the law:

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run ('currere solebat'), without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. 'Aqua currit et debet currere ut currere solebat' is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert

fruct in the water as it passes along, and does not include a proprietorship in the water itself.[2]

It may be worthy of remark that the above statement of the law of riparian rights, although believed to correctly embody the common-law doctrine, rests mainly on the authority of cases decided in the arid region. In this region, it will be

or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled doctrine on the subject, and all the difficulty that arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him, who has an equal right to the subsequent use of the same water; nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbor above him. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But 'de minimis non curat lex,' and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose land a stream passes is that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream."

[2] Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. 762; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577; Rhodes v. Whitehead, 27 Tex. 304; Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147. See Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. 889.

noticed, the general question has usually arisen in connection with a discussion of the right of the riparian proprietor to take water from the stream, and consume it for irrigation or other uses, while in the jurisdictions in which the common law arose, the right of the proprietor to the continued flow of the water was generally the prime consideration, as occasion for the permanent withdrawal and consumption of the water in these jurisdictions would rarely arise.

§ 10. In What States in Force.

The doctrine of riparian rights, as presented in the preceding section, prevails in Great Britain and the eastern states of the Union, and in all the states and territories of the arid region, with the exception of Arizona, Colorado, Idaho, New Mexico, Nevada, Wyoming and Utah. In the excepted states and territories, the common-law doctrine is regarded as unsuited to the existing local climatic conditions, and has been repudiated either by express statute or by the decisions of the courts.[3] Formerly it was held in Nevada that the common law was in force in that state,[4] but the contrary is now the established doctrine.[5] It is to be noted that

[3] Arizona: Clough v. Wing (Ariz., 1888) 17 Pac. 453; Oury v. Goodwin (Ariz., 1891) 26 Pac. 376; Austin v. Chandler (Ariz., 1895) 42 Pac. 483. See Hill v. Lenormand (Ariz., 1888) 16 Pac. 266.

Colorado: Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854.

Idaho: Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541.

New Mexico: Trambley v. Luterman, 6 N. M. 15, 27 Pac. 312. See Millheiser v. Long (N. M., 1900) 61 Pac. 111.

Utah: Stowell v. Johnson, 7 Utah, 215, 26 Pac. 290.

Wyoming: Moyer v. Preston (Wyo., 1896) 44 Pac. 845; Farm Inv. Co. v. Carpenter (Wyo., 1900) 61 Pac. 258.

[4] Vansickle v. Haines, 7 Nev. 249.

[5] Bliss v. Grayson (Nev., 1899) 56 Pac. 231.

the states and territories in which the common-law rule has been rejected are those which form the body of the strictly arid region, and in which, therefore, the common law of water rights would naturally be least applicable. The other states of the arid region occupy an intermediate position, so far as their natural moisture is concerned, between these almost wholly arid states, and the states in which there is little or no need for irrigation. In these, as might be expected, the common-law doctrine, with some modification in some cases, has been adopted.[6]

§ 11. Right of Riparian Owner to Use Water of Stream for Irrigation.

A riparian proprietor has the right at common law to make a reasonable use of the waters of a natural stream for irrigation purposes. This principle is well established, both in England and the Atlantic states, as well as in the states of the arid region where the doctrine of riparian rights obtains.[7]

[6] See cases decided in these states cited throughout this chapter. In Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570, which was an action to condemn certain property in order that a railroad company might divert the water of a nonnavigable stream from its accustomed channel, it was held that the common law of riparian rights was in force in the territory of Dakota at the time of the adoption of the constitution of North Dakota, and that the provision of section 210 of this constitution, that "all flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes," does not divest the rights of riparian owners in the waters and bed of all natural watercourses in the state.

[7] England: Embrey v. Owen, 6 Exch. 353. See, also, Strutt v. Bovingdon, 5 Esp. 56; Greenslade v. Halliday, 6 Bing. 379; Hall v.

The general doctrine as to the right of a riparian owner to use the water of a stream for irrigation is the same in the arid states as in moister regions, except that a somewhat more liberal policy as to the permissible extent of such use has been adopted in view of the greater need for irrigation in the arid region.[8]

Swift, 6 Scott, 167; Earl of Sandwich v. Great Northern R. Co., 10 Ch. Div. 707; Miner v. Gilmour, 12 Moore, P. C. 131.

United States: Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371; Union Mill & Min. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370.

Alabama: Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78.

California: Ferrea v. Knipe, 28 Cal. 340; Pope v. Kinman, 54 Cal. 3; Ellis v. Tone, 58 Cal. 289; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. 171.

Connecticut: Gillett v. Johnson, 30 Conn. 180.

Maine: Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504. See, also, Davis v. Getchell, 50 Me. 602, 79 Am. Dec. 636.

Massachusetts: Weston v. Alden, 8 Mass. 136; Anthony v. Lapham, 5 Pick. (Mass.) 175; Elliott v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85.

New Jersey: Farrell v. Richards, 30 N. J. Eq. 511.

New York: See Garwood v. New York Cent. & H. R. R. Co., 83 N. Y. 400.

Nevada: Jones v. Adams, 19 Nev. 78, 6 Pac. 442.

Oregon: Hayden v. Long, 8 Ore. 244; Coffman v. Robbins, 8 Ore. 278.

Pennsylvania: Randall v. Silverthorn, 4 Pa. St. 173; Miller v. Miller, 9 Pa. St. 74; Messinger's Appeal, 109 Pa. St. 285, 4 Atl. 162. See, also, Kaufman v. Griesemer, 26 Pa. St. 407.

Wisconsin: See Case v. Hoffman, 84 Wis. 438, 54 N. W. 793, 75 N. W. 945.

[8] See Harris v. Harrison, 93 Cal. 676, 29 Pac. 325. In Bathgate v. Irvine (Cal., 1899) 58 Pac. 442, it is said that "the rule of the common law as to riparian rights, in its extreme rigor, has not been found to be adapted to the conditions existing in this state. At

§ 12. Nature of Right.

The right of a riparian proprietor to the flow of the water of the stream is held to be inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. It follows that the right is in no way dependent upon user. Use does not create the right, and disuse cannot destroy or suspend it. If the riparian proprietor does not care or need to use the water, he still has the right to have it flow in its accustomed channel, except as its volume may have been decreased by its reasonable use by upper proprietors. His right can be lost only by grant, condemnation or prescription.[9] The statement made above, that the right is inseparable from the soil, must not be taken altogether without qualification, for, as just suggested, the right to use the water of a stream may be acquired, as against the riparian proprietor, by grant, condemnation or prescription.[10]

§ 13. Right Limited to Riparian Lands.

The right of a riparian owner to use the water of a stream for irrigation exists simply by virtue of his ownership of

common law, the riparian owner was limited in the use of the water of a stream to domestic purposes and watering stock, and might utilize it for power. We have added to these purposes that of reasonable use for irrigation."

This is not strictly accurate, for, as has just been seen, a reasonable use of the water for irrigation was allowed at common law.

[9] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Heilbron v. 76 Land & Water Co., 80 Cal. 189, 22 Pac. 62; Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. 762; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18; Bathgate v. Irvine (Cal., 1899) 58 Pac. 442.

[10] See post, §§ 77-81, 88.

the lands adjacent to the stream, and, as has already been seen, is annexed to the soil of such lands as part and parcel thereof. It follows, necessarily, that the right does not extend to one who is not a riparian owner,[11] nor can it be exercised in respect to lands which are not riparian. A riparian owner has no right to divert to nonriparian lands, to be there used, the water which he has a right to use on riparian lands, but which he does not so use.[12] It is to be observed that the foregoing has reference to the right of a riparian owner, as such, to use the water of the stream, as against lower riparian proprietors. There would seem to be no reason why more extensive rights could not be acquired, as against lower proprietors, by grant or prescription, or why, when the water supply is abundant, and no possible injury could result to lower proprietors, a riparian owner might not be permitted to use the water on nonriparian lands, as well as upon land bordering on the stream. It is certain, however, that he cannot do this where it would in any way interfere with the riparian rights of lower proprietors.

§ 14. What Lands are Riparian.

Some questions have been raised as to what lands are to be considered riparian, within the sense of the preceding section. Literally, of course, riparian lands are lands bordering upon a stream, but it is sometimes a question as to how far back from the stream the land may be considered riparian. There is very little judicial authority on the question. It is

11 Hayden v. Long, 8 Ore. 244. See, also, Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217.

12 Chauvet v. Hill, 93 Cal. 407, 28 Pac. 1066; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577; Bathgate v. Irvine (Cal., 1889) 58 Pac. 442.

plainly not possible to define the distance to which the riparian proprietor's right to use the water for irrigation or other purposes extends, but this will depend upon the circumstances of each case. The only general rule that can be laid down is that the distance and use should be reasonable.[13] It is settled that lands lying in another watershed, although forming a portion of the same tract with riparian lands, are not riparian in respect to the same stream.[14]

The question whether a particular tract of land is riparian will depend not only upon its situation with reference to a stream, but also upon the fact of ownership. To be a riparian proprietor, a person must of course own land bordering on the stream, and hence the owner of a tract of land which does not itself touch the stream, although it may lie in the valley of the stream, so that it would be riparian land if belonging to the same owner, and forming a part of the same tract with land bordering on the stream, is not a riparian owner, and his land is not riparian land. Hence, the same piece of land might be riparian, or not, according to the situs of the title.[15]

This doctrine has been applied in California in a recent case, in which it was held that, where the owner of riparian land acquires title to other land contiguous thereto, but lying away from the stream, the land so acquired does not become riparian. Otherwise it would follow that the riparian rights acquired by a purchase of a tract of land upon a stream

[13] Sparks Mfg. Co. v. Town of Newton (N. J. Ch., 1898) 41 Atl. 385. This was a case involving the right to use water for municipal purposes.

[14] Bathgate v. Irvine (Cal., 1899) 58 Pac. 442.

[15] See Palmer v. Dodd, 64 Mich. 474, 31 N. W. 109; Stark v. Miller, 113 Mich. 465, 71 N. W. 876. (Not irrigation cases.)

would extend to all lands he might subsequently acquire, no matter from whom, nor under what titles, nor how distant from the stream, provided he owned all the land between the stream and the land so purchased.

In the case at bar, the tracts of land in question were quarter-sections granted each by a separate patent, based upon a separate entry, and constituted, therefore, distinct tracts of land, and the court held that mere contiguity cannot extend a riparian right which is appurtenant to one quarter-section, to another, although both are owned by the same person.[16] A fortiori, the riparian rights of the owner of land bordering on a stream do not extend to other land owned by him, not itself bordering on the stream, and not contiguous to the former tract.[17]

The fact that the land of a riparian owner lies above the level of the stream, and so cannot be irrigated by the same method ordinarily employed on other land, but only by the use of pumps or other appliances for raising the water, does not affect the right of the proprietor to use the water on such land.[18]

16 Boemer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. 908. See, also, Lux v. Haggin, 69 Cal. 255, at pages 424, 425, 10 Pac. 674.

17 See Sparks Mfg. Co. v. Town of Newton (N. J. Ch., 1898) 41 Atl. 385.

18 Charnock v. Higuerra, 111 Cal. 473, 44 Pac. 171.

In Earl of Norbury v. Kitchin, 7 Law Times (N. S.) 685, it was held that a riparian proprietor might take water from the stream by pumping machinery, elevate it to a reservoir, and thence convey it by pipe to nonriparian lands, to be there used; the court holding that neither the mode of diversion, nor the use to which the water was applied, was material, the only question being whether or not the proprietor had taken more than his reasonable share of the water.

§ 15. Measure of Right—Use must be Reasonable.

Having examined the right of a riparian proprietor to use the water of a stream for irrigation as to its existence and nature, our next inquiry will be as to the extent of that right, —that is, how much water may an individual proprietor use, and what are his duties as to such use in respect to other proprietors. In the first place, it may be said that the only general rule that can be laid down in this connection of universal application is that the use of water for irrigation by a riparian proprietor must in all cases be reasonable, due regard being had to the rights and needs of all the other proprietors on the stream. Upon this rule all the authorities are agreed.[19]

§ 16. What is a Reasonable Use.

In the nature of things, no precise rule can be laid down as to what constitutes a reasonable use. The reasonableness of the use will in all cases be a question of fact, depending upon the circumstances of each particular case. In determining the question of reasonableness, reference must be had to a variety of considerations, such as the size of the stream, the extent of area to be irrigated, the character of the soil, the nature of the crops to be raised, the number and needs of other proprietors entitled to use the water, and the like.[20]

Of these considerations, it is especially important to ob-

[19] See cases cited ante, § 11, and post, § 16.

[20] Embrey v. Owen, 6 Exch. 353; Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Heilbron v. 76 Land & Water Co., 80 Cal. 189, 22 Pac. 62; Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Miller v. Miller, 9 Pa. St. 74.

serve that the question as to what use of water for irrigation by a riparian proprietor in a particular case is reasonable is to be determined with reference not only to his individual needs, but also to the rights and needs of other proprietors. The controlling principle is that every proprietor along the stream has an equal right to its use and benefit. All have a usufruct, while none have any absolute property in the water, and no one has a right to use it unreasonably, to the injury of other proprietors, above or below.[21] The question has been frequently raised as to what amounts to an injury in such case. As might be expected, the tendency of the decisions in England and the Atlantic states is towards a less liberal doctrine as to the quantity of water that may be consumed by a riparian proprietor for irrigation purposes than that established in the Pacific states. In England, it seems that any perceptible diminution of the water of the stream would give a right of action in favor of a lower proprietor.[22] In the eastern states, the general trend of the decisions is to the effect that any substantial or essential diminution of the stream is unreasonable, and not permissible, but even here, the main inquiry seems to be whether the lower proprietor is materially injured or not.[23] It is obvious that any

21 Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371.

22 Embrey v. Owen, 6 Exch. 353.

23 Decisions in the Atlantic states:

Connecticut: In Gillett v. Johnson, 30 Conn. 180, the controversy arose over the right of the defendant to use the water of a small stream arising on her land, and naturally flowing to the land of the plaintiff, who had been accustomed to use it for watering his cattle. The defendant's rights were thus defined by the court: "The right of the defendant to use the stream for purposes of irrigation cannot be questioned. But it was a limited

use whatever of the water of a stream for irrigation must necessarily involve some loss by evaporation and absorption, and, where the stream is small, will ordinarily result in a sensible and material reduction of its volume. To deny to the riparian owner the right to sensibly diminish the flow of water in the stream would therefore often amount to a denial of his right to use the water for irrigation at all; yet, as has been already seen, the right to make a reasonable use of the water for this purpose is conceded by all the authorities.

In the Pacific states, the courts have been controlled by the same general principles of law as have been announced and observed by the courts of England and the Atlantic states, but, in view of the local climatic conditions, a somewhat more liberal view has been adopted as to the amount of water that

right, and one which could only be exercised with a reasonable regard to the right of the plaintiff to the use of the water. She was bound to apply it in such a reasonable manner and quantity as not to deprive the plaintiff of a sufficient supply for his cattle."

Maine: In Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504, the court said: "[A riparian proprietor] may make a reasonable use of the water itself for domestic purposes, for watering cattle, or even for irrigation; provided it is not unreasonably detained, or essentially diminished."

Massachusetts: Every man through whose land the water passes may use it for irrigating his land, but he must so use it as to do the least possible injury to his neighbor, who has the same right. Anthony v. Lapham, 5 Pick. (Mass.) 175. See, also, the leading case, Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85.

New York: In this state it has been held that a riparian proprietor has a right to use as much water as is necessary for his family and his cattle, but he has no right to use it on his land if he thereby deprives a lower proprietor of the reasonable use of the water in its natural channel. Arnold v. Foot, 12 Wend. (N. Y.) 330.

may be consumed in making a reasonable use of it for irrigation. As pointed out in a recent leading case, the question whether the use is reasonable is not so much whether the water below is diminished thereby, as whether the lower proprietor is materially injured by the diminution.[24] It is settled in the Pacific states that the use of water for irrigation may be reasonable, although the quantity of water flowing to a lower proprietor may be appreciably and substantially diminished thereby.[25] But neither in the Pacific states, nor in other jurisdictions, is a riparian proprietor or other person permitted to use the water of a stream for irrigation to the material injury of lower proprietors.[26] The mere fact that the land of the lower proprietor is rendered less productive does not make the use unreasonable.[27] But each riparian proprietor must so use the water for irrigation as to do the least possible injury to lower proprietors,[28] and, where the right of lower proprietors to use the water, either for irrigation or other purposes, is seriously interfered with, the use is unreasonable. Thus, one proprietor will not be permitted, as against a lower mill owner, to divert or dam up the water for irrigation, so as to prevent the running of the mill.[29]

That use is considered unreasonable which works actual, material, and substantial damage to the common right,—not to an exclusive right to all the water in its natural state, but to the right which each proprietor has, as limited and quali-

24 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

25 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

26 See cases cited throughout this section.

27 Weston v. Alden, 8 Mass. 136.

28 Anthony v. Lapham, 5 Pick. (Mass.) 175.

29 Colburn v. Richards, 13 Mass. 420, 7 Am. Dec. 160; Cook v. Hull, 3 Pick. (Mass.) 269, 15 Am. Dec. 208.

fied by the precisely equal right of every other proprietor.[30]

§ 17. No Right to Use Entire Flow of Stream.

It is sometimes stated that an upper proprietor may exhaust the stream for the supply of his natural wants, as for domestic purposes, and for drink for himself and family, and for watering his cattle; his right in such case being measured by his own absolute necessity, regardless of the effect of the exercise of such right upon lower proprietors. It is believed that there is no decided case in which the precise question has been necessarily involved, and, if such is the law, it rests upon the opinions of text-book writers and judicial dicta, and, if sustained, it must be upon the ground that the total consumption of the water is a reasonable use, under the circumstances. As has been suggested in a leading case, it may admit of question whether an upper proprietor on a small stream would be permitted to consume the whole of it in watering his cattle, so as to deprive a lower proprietor of sufficient water to quench the thirst of himself and family.[31] This would seem to be simply a question of the relative importance, among themselves, of these so-called "natural" wants. But, however it may be so far as these wants are concerned, and irrespectively of any arbitrary classification of irrigation as a natural or artificial want, we have already seen that one riparian proprietor may use the water of the stream for irrigation purposes only upon condition that he so use it as not to materially interfere with the correlative

[30] Union Mill & Min. Co. v. Dangberg, 2 Sawy. 456, Fed. Cas. No. 14,370.

[31] Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371.

rights of other proprietors. From this it necessarily follows that one proprietor cannot divert and consume the entire flow of a stream for irrigation purposes, to the exclusion of lower proprietors, whose right to the water is as good as his own,[32] and the fact that all the water in the stream may be necessary for the proper irrigation of his land cannot change the rule.[33] Any other rule would be entirely subversive of the well-established doctrine that the rights of all the riparian proprietors, as such, are equal, and that each is entitled to a reasonable use of the water for irrigation.[34]

A riparian proprietor may lose his right to complain of the total consumption of the water of the stream by an upper proprietor by contract or agreement. Thus, where the sole occupants of lands bordering on a stream which, after leaving their lands, flowed upon the public domain, appropriated the entire flow of the stream, and, by agreement, apportioned the water among themselves, it was held that such agreement was valid, and that the riparian rights of one of the parties, who

32 Learned v. Tangeman, 65 Cal. 334, 4 Pac. 191; Gould v. Stafford, 77 Cal. 661, 18 Pac. 879; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Gillett v. Johnson, 30 Conn. 180; Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Arnold v. Foot, 12 Wend. (N. Y.) 330.

33 Learned v. Tangeman, 65 Cal. 334, 4 Pac. 191.

34 In Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85, Shaw, C. J., said: "This rule, that no riparian proprietor can wholly obstruct or divert a watercourse, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quantity of his property, deemed in law incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors, and so each is bound so to use his common right as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right by all the proprietors."

afterwards acquired land further down the stream, were subordinated to those granted by the contract.[35]

§ 18. Relative Rights of the Several Proprietors.

It is a fundamental principle of the doctrine of riparian rights that all the riparian proprietors along a stream have an equal right to use the water of the stream for irrigation and other purposes. Of course, however, this does not mean that all the proprietors are entitled to an equal quantity of water, but only that one proprietor's right to use the water in a reasonable manner is as perfect and inviolate as that of any of the others. The respective quantities of water to which the several proprietors are entitled are to be determined by reference to the general principles upon which the right to use water for irrigation at all is based.

To summarize these principles, it may be said that each proprietor is entitled to use so much, and only so much, of the water of the stream as may be reasonably necessary for the irrigation of his riparian lands, due regard being had to the rights of other proprietors, and all the circumstances of the case. His right is measured by his necessity,—that is, he cannot claim any more water than is or would be necessary for the proper irrigation of his land. But his own necessity is not the only determining factor. His right must be exercised with due regard to the rights of others. He cannot claim all the water of the stream, although all, or more than all, might advantageously be used on his own land, for this would be to exclude other proprietors from all enjoyment of the water. Nor can he use more than his due proportion,

[35] Alhambra Addition Water Co. v. Mayberry, 88 Cal. 68, 25 Pac. 1101.

considering the number of proprietors, and the extent and needs of their lands, respectively.[36] On the other hand, the right of each proprietor is measured, not by the quantity of water which he actually appropriates [37] or uses, for his right is not in any way dependent for its creation or continuance upon user, but exists as an incident of the soil,[38] and hence the amount of irrigable land belonging to each owner, rather than the amount under cultivation, is the controlling factor in adjusting the rights of the several owners.[39]

It is apparent from the foregoing that the quantity of water to which one proprietor may be entitled need not, and ordinarily will not, be the same as that which may be claimed by another. The right to use the water for irrigation results from the need of water upon the land. Assuming this need, in any given case, to exist equally as to all the riparian land, the respective rights of the proprietors must clearly be in proportion to their respective ownerships upon the stream. If every riparian proprietor on a given stream owned the same quantity of land, with the same frontage on the stream, and the same susceptibility to and need of irrigation, each would be entitled to precisely the same quantity of water for that purpose.[40] These conditions will, of course, rarely, and perhaps never, be all satisfied in any actual case, but the principle illustrated is the one that must control in all cases.

36 See ante, §§ 9, 15-17.

37 Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. 308.

38 See ante, § 12. See, also, Heilbron v. 76 Land & Water Co., 80 Cal. 189, 22 Pac. 62.

39 Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 45 Pac. 160, 54 Am. St. Rep. 337.

40 See Charnock v. Higuerra, 111 Cal. 473, 44 Pac. 171.

It may sometimes happen that the water of a stream, although sufficient to supply the wants of some of the proprietors, provided they may take all of the water, will be wholly inadequate for the use of all who may be entitled to a share therein, if all claim the water at the same time. In such case, should each proprietor insist that every other proprietor take from the stream only his due proportion of the water, it is apparent that the entire flow of the stream might be consumed, and no proprietor receive any substantial benefit therefrom, or, because some proprietors might not happen to need the water at the time, water absolutely necessary for the use of other proprietors might run to waste in the stream. To avoid this result, it would obviously be to the interest of all the proprietors to agree among themselves that the water be apportioned between them by periods of time, rather than by a division of its quantity, as they might undoubtedly lawfully do, so that each may have the full flow of the stream, or so much thereof as may be necessary, during such designated periods, instead of a portion of the flow during all the time. In the absence of any such agreement, a court of equity has power to so apportion the water when the circumstances are such that a division in this manner will best conserve the rights of all the riparian proprietors.[41]

§ 19. Return of Surplus Water to Channel.

After a riparian proprietor has made such reasonable use of the water for irrigation as he is entitled to make, he is required to return the surplus water into its natural channel before it leaves his land, and flows upon that of the lower

41 Harris v. Harrison, 93 Cal. 676, 29 Pac. 325; Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 45 Pac. 160, 54 Am. St. Rep. 337.

proprietor, so as to leave the latter in the enjoyment of his right to the unaltered flow of the stream, except so far as it may have been diminished by the reasonable use of the upper proprietor.[42] If the surplus is not so returned, its diversion will be restrained at the suit of a lower riparian proprietor.[43] The manner in which the water is returned to the natural channel before reaching the land of the lower proprietor is immaterial to him, so long as his rights are not impaired, and he cannot require the upper proprietor to return it in any particular manner.[44] Thus, it may be permitted to flow back naturally, or may be returned by means of pipes, as the upper proprietor may see fit.[45]

§ 20. Point of Diversion and Return.

The right of a riparian proprietor to divert the water of a stream, and his duty to return to its natural channel the surplus water diverted by him, having been established and defined, it may be pertinent to inquire as to his right and duty in respect to the point of such diversion and return. Clearly, one proprietor has no right to go upon the land of another for the purpose of constructing a dam or ditch thereon, or to convey water across the same, unless such right be acquired by grant or prescription, or by the estoppel of the land owner to object. It follows from this that, in the absence of such

42 Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371; Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504; Anthony v. Lapham, 5 Pick. (Mass.) 175.

43 Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Barrows v. Fox, 98 Cal. 63, 32 Pac. 811.

44 Gould v. Eaton, 117 Cal. 539, 49 Pac. 577.

45 Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 45 Pac. 160, 24 Am. St. Rep. 337.

right so acquired, the point of diversion must necessarily be on his own land. As to the return of the surplus water of the stream to its natural channel, the rule is generally stated to be that the proprietor using the water must return the surplus to the channel before it leaves his land, and this is undoubtedly the law, not only for the reason stated above, but for the additional reason that one proprietor will not be permitted to discharge a volume of water in a new and unaccustomed channel upon the land of a lower proprietor, to his injury. Circumstances may exist, however, in which, in order to secure a sufficient fall, or for other reasons, it may be greatly to the advantage of the irrigator to take the water from the stream at some point above his own land, or to discharge it at some point below. As pointed out above, the land of other proprietors can be subjected to such an easement only by virtue of a grant or a prescriptive right, or because the land owner is estopped to object. But that a riparian proprietor may secure such easement in any of the ways named is clear.

It should be observed, however, that the fact that a landowner diverts the water above, or discharges it into the natural channel below, his own land, may have an important bearing on the question of reasonable use. The conveyance of the water diverted must entail some loss by absorption and evaporation, which, in the case of a long ditch, may be considerable, and, as the riparian proprietor is entitled to take from the stream only a certain quantity of the water, it seems that, where water is lost by reason of his conveying it across the land of others for his own convenience, the loss should fall on him.[46]

[46] The questions raised in the text were discussed by Hillyer, J.,

§ 21. Right to Water Artificially Developed.

The water rights of a riparian owner, as such, extend only to the water of natural streams, naturally flowing therein. No riparian rights can be claimed in the water flowing in an artificial channel,[47] or in the water artificially developed and turned into a natural channel. The right to the artificial increment of a stream is entirely distinct from the right to the natural flow. Such increment belongs to the person by whom it was developed, and the riparian proprietors along the stream have no right or interest therein, and the owner

in Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, as follows:

"It may also result from the principles established by the authorities that the riparian owner is only entitled to take the water from the stream on his own land, returning it to the stream before it leaves his land. This point does not appear to have been expressly decided, but whenever the authorities allude to it at all, they speak of taking the water on the land of the riparian proprietor, and returning the surplus before it leaves the land, as though this was a well-recognized condition of a proper use. However this may be, it would not be permissible to take the water at some distance above, and return the surplus at some distance below, the land of the riparian proprietor using the water, if thereby a considerable portion of it would be wasted before reaching the land, or after leaving it, and before it is returned to the stream, to the injury of other riparian proprietors below. At all events, this circumstance would have an important bearing upon the question of reasonable use. The defendant diverts the water at a point considerably distant from his land, and his ditch does not return any of the water to the river, but either conducts it on to Danberg's farm, or leaves it, principally, to find its way through sloughs, or down the natural declivity, to the west fork, more than a mile distant,—some little perhaps to the east fork, whence it is taken. This statement, we think, shows that the use made of the water by the defendant at the period in question was unreasonable, and amounted almost to wanton waste."

[47] Green v. Carotta, 72 Cal. 267, 13 Pac. 685.

may use or withdraw it from the channel at pleasure, so long as he does not, in so doing, interfere with the rights of other persons in the natural flow of the stream.[48] Thus, where an upper proprietor, by providing artificial means for carrying to the land of a lower proprietor the water that would naturally reach such land, is able to save water that would otherwise be lost by absorption and evaporation, he is entitled to all the water so saved, as against the lower proprietor.[49] So, also, a contract securing to one of the parties the right to use the water flowing in a natural channel does not give him the right to water afterwards artificially developed and turned into the stream.[50]

48 Paige v. Rocky Ford Canal & Irr. Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 46 Pac. 169, 24 Am. St. Rep.. 337; Mayberry v. Alhambra Addition Water Co. (Cal., 1898) 54 Pac. 530. See, also, Platte Valley Irr. Co. v. Buckers Irr., Mill & Imp. Co., 25 Colo. 77, 53 Pac. 334.

49 Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 46 Pac. 160, 24 Am. St. Rep. 337.

50 Mayberry v. Alhambra Addition Water Co. (Cal., 1898) 54 Pac. 530.

CHAPTER III.

THE DOCTRINE OF APPROPRIATION.

I. The Right of Appropriation.

§ 22. Acquisition of Water Rights by Appropriation.
23. Origin of the Doctrine of Appropriation.
24. Constitutionality of Statutes Authorizing Appropriation.
25. Extent of Application of the Doctrine of Appropriation in the Several States.

II. Appropriation under Acts of Congress.

26. Appropriation of Water on the Public Domain.
27. How Existence of Water Right on Public Domain is Determined.
28. Relative Rights of Appropriator of Water and Grantee of Land.
29. Same—Appropriation Subsequent to Grant.
30. Same—When Rights of Grantee Attach.

III. What Water may be Appropriated.

31. General Statement—Natural Streams Subject to Appropriation.
32. What Constitutes a Stream or Watercourse.
33. Percolating Waters and Subterranean Streams.
34. Navigable Streams.

IV. Who may Appropriate Water.

35. Who may Appropriate Water.

V. How Water is Appropriated.

36. The Elements of a Valid Appropriation.
37. Notice of Appropriation—Posting and Recording Notice.
38. Same—What is a Sufficient Notice.
39. Same—Appropriation Without Posting of Notice.
40. Filing Map and Statement of Appropriation.

41. Diversion of Water—Water must be Diverted Within a Reasonable Time.
42. Same—Modes of Diverting and Conducting Water.
43. Same—Use of Natural Channel or Ravine as Part of Ditch.
44. Same—Use of Ditch Constructed by or Belonging to Another.
45. Same—Diversion must be with Intent to Use Water for a Beneficial Purpose.
46. Same—Change of Point or Means of Diversion.
47. Application of Water to Beneficial Use—Water must be Used Within a Reasonable Time.
48. Same—Gradual Application through Successive Seasons.
49. Same—Methods of Applying Water.
50. Same—Place of Use.
51. The Doctrine of Relation.

VI. The Right Acquired by Appropriation.

52. The Doctrine of Priority.
53. Priority between Appropriators Using Water for Different Purposes.
54. Quantity of Water That may be Claimed—General Principles.
55. Same—How Far Determined by Capacity of Ditch.
56. Same—Water must be Used in a Reasonable Manner.
57. Same—Appropriation of Entire Flow of Stream.
58. Same—Surplus Water.
59. Same—Enlargement or Extension of Use.
60. Right to Flow of Tributaries.
61. Use of Water by Periods.

I. The Right of Appropriation.

§ 22. Acquisition of Water Rights by Appropriation.

In our consideration of the law of irrigation under the doctrine of riparian rights in the preceding chapter, we have found that this doctrine, as adopted and applied in the western states, is substantially the same as in Great Britain and

the eastern states, and no new principle has been ingrafted into it, although the climatic conditions under which it is applied are radically different. We are now to examine an entirely new principle in the law of water rights, namely, the doctrine of appropriation,—perhaps the most original contribution of our western civilization to the science of jurisprudence. According to this doctrine, a right to the use of the water of natural streams, not already appropriated by others, may be acquired by simple appropriation, irrespective of the ownership of the lands through which the streams may flow, or any other considerations. In most of the states in the arid region it is provided by constitution or statute, or both, that the unappropriated water of natural streams shall be subject to appropriation for irrigation and other useful purposes,[1] and, as will presently be seen, this doctrine existed prior to any legislation or constitutional provisions on the subject.[2]

§ 23. Origin of the Doctrine of Appropriation.

The doctrine of appropriation of water originated in California soon after the first settlement of that state upon the discovery of gold in 1848. Its first application was in connection with mining operations. For such purposes, water was absolutely indispensable, but as such use often necessarily involved the diversion of the water to points at a distance from the stream, from which it could not well be restored to its natural channel, as well as its substantial diminution in quantity and deterioration in quality, it was found that the common-law doctrine governing the right to the use of the water of natural streams was inapplicable. Moreover, at that time this territory belonged almost entirely to the public

1 See statutes, etc., in Appendix.

2 See post, § 23. Coffin v. Left Hand Ditch Co., 6 Colo. 443.

domain, and there were therefore no riparian proprietors, except so far as the government might be said to possess riparian rights, by whom the common-law rights of riparian proprietors might be asserted. Hence, the settlers were free to adopt any rules as to the right to use water for mining or other purposes as might seem best suited to the existing conditions, just as, in the absence of any settled government, owing to the rapidity with which the country was filled up with people from all parts of the world, all government was largely a matter of local regulation. Thus, the mining industry was at an early date regulated according to certain customs and rules adopted by the miners of the various mining districts. The essential principle of these rules and regulations was that the right to a mining claim could be acquired only by prior discovery and appropriation, and retained by actual work and development. The application of this principle was necessarily extended to the acquisition of the right to the use of water, without which, mining operations could not be successfully conducted. These mining rules and customs were soon recognized and sanctioned by the state courts, and were acquiesced in by the federal government, and finally confirmed by act of congress.

The doctrine of priority thus first established by the custom of miners with reference to the use of water in mining has been extended and applies with equal force to its use for irrigation and other beneficial purposes.[3]

[3] As to the origin and development of the doctrine of the appropriation of water, see, generally, Jennison v. Kirk, 98 U. S. 453; U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 19 Sup. Ct. 770; Hill v. Lenormand (Ariz., 1888) 16 Pac. 266; Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541.

In Atchison v. Peterson, 20 Wall. (U. S.) 507, Field, J., said: "By the custom which has obtained among miners in the Pacific

§ 24. Constitutionality of Statutes Authorizing Appropriation.

The constitutionality of statutes authorizing the acquisition of a water right by appropriation is a question that has received but little attention from the courts, their constitutionality being generally tacitly conceded. The precise point upon which the constitutionality of such statutes would most naturally be assailed is that, in abrogating the common-

states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mine, or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only to a very limited extent, to the necessities of miners, and inadequate to their protection. By the common law, the riparian owner on a stream not navigable takes the land to the center of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate. And as all such owners on the same stream have an equality of right to the use of the water, as it naturally flows, in quality, and without diminution in quantity, except so far as such diminution may be created by a reasonable use of the water for domestic, agricultural, or manufacturing purposes, there could not be, according to that law, any such diversion or use of the water by one owner as would work material detriment to any other owner below him. * * * This equality of right among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on

law doctrine of riparian rights, they may authorize the taking or damaging of private property for a private use without compensation. The right of a riparian proprietor to the flow of the water of a stream is clearly property, which, when vested, can be destroyed or impaired only in the interest of the general public, upon full compensation, and in accordance with established law.[4] A state legislature has no power, by a general law authorizing the appropriation of water by private persons, to deprive a riparian proprietor of his vested rights.[5] And it has recently been held in Nebraska that the act of that state of 1889, as amended in 1893, providing for the acquisition of a right to the use of running water by appropriation, with a proviso that, in all streams not more than twenty feet in width, the rights of the riparian proprietor should not be affected by the act, is unconstitutional. The court proceeded upon the ground that riparian rights had become vested in all the streams of the state prior to the passage

streams or otherwise, there could be no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale, and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So, the miners on the public lands throughout the Pacific states and territories, by their customs, usages, and regulations, everywhere recognized the inherent justice of this principle."

4 Clark v. Cambridge & A. Irr. & Imp. Co., 45 Neb. 798, 64 N. W. 239.

5 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 758.

of the act, which was therefore a clear invasion of private rights, within the prohibition of the constitution.[6] But this objection to the appropriation statutes cannot prevail where no riparian rights have vested.

As has been already stated in a previous section, in many of the arid states the doctrine of riparian rights has never been in force, and hence riparian proprietors, as such, have never had any rights which could be in any way affected by the statutes. In some states, either by the express terms of the statutes, or by judicial construction, the rights of riparian proprietors are saved from the operation of the statutes, and the doctrine of appropriation is limited so as to apply only to water on the public lands, where no riparian rights in private individuals can attach.[7] The statutes, therefore, in these states, are clearly not unconstitutional on the ground that they impair vested rights of riparian proprietors.

In a recent case in the supreme court of the United States it was held that the power to change the common-law rule, and permit the appropriation of the water of the streams with-

6 Clark v. Cambridge & A. Irr. & Imp. Co., 45 Neb. 798, 64 N. W. 239. In this case, the court conceded the right of appropriation for public uses in the following language:

"That the state may, in the exercise of the right of eminent domain, appropriate the water of any stream to any purpose which will subserve the public interests is not doubted, and that the reclamation of the inarable lands of the state is a work of public utility, within the meaning of the constitution, is a proposition not controverted in this proceeding. But even the state in its sovereign capacity is, as we have seen, within the restrictions of the constitution, and can take or damage private property only upon the conditions thereby imposed. The proposition that the rights of riparian proprietors were abolished by operation of the statutes is therefore without merit."

7 See post, § 25.

in its domain, undoubtedly belongs to each state, and possibly to a territory as well, but that to this power there are two limitations: First, that, in the absence of specific authority from congress, a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property; and, second, that it is limited by the superior power of the general government to secure the uninterrupted navigation of all navigable streams within the limits of the United States.[8] As will be seen later, the right of appropriation of the public domain has been recognized and confirmed by acts of congress.[9]

§ 25. Extent of Application of the Doctrine of Appropriation in the Several States.

While the doctrine of appropriation prevails in all the arid states, the extent to which it is carried is not everywhere the same. The doctrine is wholly contrary to, and inconsistent with, the common-law doctrine of riparian rights, and hence, in those states in which the latter doctrine prevails, the doctrine of appropriation applies only where the common-law doctrine is inapplicable,—that is, to streams in which no riparian rights have attached. It is accordingly held in these states that the doctrine of appropriation applies to, and only to, the water on the public lands, belonging either to the state[10] or to the United States, and that the right to water

[8] U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 19 Sup. Ct. 770.

[9] See post, § 26.

[10] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Wood v. Etiwanda

for irrigation cannot be acquired by prior appropriation, where the land has been reduced to private ownership.[11] The right of appropriation cannot be exercised in these states, as against a riparian proprietor.[12] In California, the statute authorizing the appropriation of water expressly provides that the rights of riparian owners shall not be affected by its provisions.[13]

In Texas, the statute provides that the unappropriated waters of rivers and natural streams within the arid portions

Water Co., 122 Cal. 152, 54 Pac. 726; Smith v. Denniff (Mont., 1900) 60 Pac. 398; Carson v. Gentner, 33 Ore. 512, 52 Pac. 506.

11 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197; Smith v. Denniff (Mont., 1900) 60 Pac. 398; Kaler v. Campbell, 13 Ore. 596, 11 Pac. 301; Simmons v. Winters, 21 Ore. 35, 27 Pac. 7; Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588; Ellis v. Pomeroy Imp. Co., 1 Wash. 572, 21 Pac. 27; Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314; Benton v. Johncox, 17 Wash. 277, 49 Pac. 495, 61 Am. St Rep. 912; Offield v. Ish (Wash., 1899) 57 Pac. 809. See the discussion in the early Montana case as to the right to appropriate water. Thorp v. Freed, 1 Mont. 651.

The existence of a military reservation on public land does not affect the right of an irrigator to appropriate water on the public domain above the reservation, except so far as the water may have been previously appropriated for the use of the military post. Krall v. U. S., 79 Fed. 241.

12 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. 762; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18; and cases cited in note immediately preceding.

13 Civ. Code Cal. § 1422. This section is construed as saving and protecting the riparian rights of all those who, under the land laws of the state, shall have acquired from the state the right of possession to a tract of riparian land prior to the initiation of proceedings to appropriate water in accordance with the provisions of the Code, and limiting the right of appropriation to the water on land belonging to the state or the United States. Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

of the state, in which, by reason of the insufficient rainfall, irrigation is necessary for agricultural purposes, may be ap- diverted so as to deprive riparian proprietors of the use of propriated; provided, however, that the water may not be the water for domestic use.[14] This act is not inoperative because of its failure to designate the territory which shall be deemed the arid portion of the state. This is a question of fact, to be determined as any other fact, and the courts have not judicial knowledge of what territory is embraced within the arid region,[15] though it is a matter of common knowledge that there are portions of the state where agriculture cannot be successfully conducted without irrigation.[16]

Where it does not appear whether the land through which a stream from which a right to divert water is claimed by virtue of an appropriation thereof was public or private property at the time of such appropriation, it will not be presumed that such land was public, but the burden of proving this fact rests upon the claimant.[17]

In the states in which the doctrine of riparian rights is not in force, there is no restriction upon the exercise of the right of appropriation, so far as the character of the land to be irrigated, or from which the water is to be taken, is concerned; but the right extends to the unappropriated water of all the natural streams within the state, whether the land by or through which they flow be private or a part of the public domain.[18]

14 Supp. Sayles' Civ. St. art. 3000a, §§ 1, 2.

15 McGhee Irr. Ditch Co. v. Hudson, 85 Tex. 587, 22 S. W. 398. See, also, Slattery v. Harley, 58 Neb. 575, 79 N. W. 151.

16 Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540; Mud Creek Irr., Agr. & Mfg. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078.

17 City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197.

18 See post, § 50.

The right acquired by priority of appropriation is entitled to

II. Appropriation under Acts of Congress.

§ 26. Appropriation of Water on the Public Domain.

We have several times had occasion to speak of the appropriation of water on the public domain, and it is now proposed to examine this question more in detail, with especial reference to the acts of congress on the subject. It will be remembered, in this connection, that the title to the land now embraced in the western states and territories was originally vested in the United States, subject to the Indian right of occupancy, where this existed. This land has now been very largely reduced to private ownership, but large tracts of land still remain throughout this region to which the government title is not yet extinguished, and which constitute the public domain. The power to control or dispose of the public land is vested exclusively in the United States as proprietor, and the state governments have no jurisdiction to pass laws in any way infringing upon the proprietary rights of the general government.

The United States government, as the proprietor of the public lands, has the same property and right in the streams flowing through them as any other proprietor would have. Such streams are part and parcel of the land through which they flow, inseparably annexed to the soil, and the use thereof as an incident to the soil passes with the land to a patentee of the government, and no occupancy or appropriation of water

protection as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain, and it is immaterial whether or not it be mentioned in the patent, and expressly excluded from the grant. Coffin v. Left Hand Ditch Co., 6 Colo. 443.

on the public domain, or local legislation or judicial action, can in any way restrict or affect the operation of the government patent.[19] The right to use the water on the public domain for irrigation or other purposes can be derived only from the federal government. As has been stated in a previous section, however, at an early date, under the pressure of local conditions and necessities, the doctrine was established in California, and subsequently in other states, that a right to the use of water of natural streams on the public domain for mining, agricultural, and other purposes might be acquired by priority of appropriation. The water rights thus acquired rested for a long time solely upon the local customs, laws, and decisions of courts, and of course could not have been asserted against the general government, had the latter seen fit to object. But the acquisition of water rights on the public domain in this manner has always been acquiesced in and encouraged by the national government, and was finally expressly sanctioned by the act of congress of July 26, 1866, in a section embodied in the United States Revised Statutes (§ 2339).[20] It is to be noted that this statute simply confirmed to the owners of water rights on the public domain the same rights which they held under the local customs, laws and decisions of courts prior to its enactment; that it did not introduce, and was not intended to

[19] Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Vansickle v. Haines, 7 Nev. 249.

The water in a nonnavigable stream flowing over the public domain is a part and parcel thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper. Howell v. Johnson, 89 Fed. 556.

[20] See statute in Appendix.

introduce, any new system, or to evince any new or different policy on the part of the general government; but that it recognized, sanctioned, protected and confirmed the system already established by the local customs, laws and decisions of courts, and provided for its continuance.[21] It was "rather the voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." [22]

The protection afforded by these acts is wholly independent of state lines, and an appropriator of water for irrigation in one state from a stream flowing in two states may maintain a bill in a federal court to enjoin the diversion of the water of the stream, to his injury, by a later appropriator in the other state.[23]

The act of 1866 is prospective in its operation, and cannot be construed so as to affect the rights of one who has acquired title to land before the passage of the act.[24]

§ 27. How Existence of Water Right on Public Domain is Determined.

When a possessory right to the use of water is claimed, the question whether or not such right exists is to be deter-

21 Basey v. Gallagher, 20 Wall. (U. S.) 670; Jennison v. Kirk, 98 U. S. 453; Broder v. Water Co., 101 U. S. 274; Krall v. U. S., 79 Fed. 241; Cave v. Crafts, 53 Cal. 135; Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571; Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587; City of Denver v. Mullen, 7 Colo. 345, 3 Pac. 693; Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. 711; Jones v. Adams, 19 Nev. 78, 6 Pac. 442; Carson v. Gentner, 33 Ore. 512, 52 Pac. 506; Benton v. Johncox, 17 Wash. 277, 49 Pac. 495.

22 Broder v. Water Co., 101 U. S. 274.

23 Howell v. Johnson, 89 Fed. 556.

24 Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,-371; Union Mill & Min. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas.

mined by reference to the local customs, laws and decisions, and, when the right is thus ascertained, the statute has the force of confirming it to the person entitled under the local customs, laws and decisions.[25] The union of the three conditions named in the statute—that is, that the right should be recognized and acknowledged by the local customs, by the laws, and by the decisions of courts—is not essential to the perfection of the right by priority; and, in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily prevail.[26] What is the customary law in respect to the use of water may be shown by evidence of the local customs, laws and decisions,[27] of which, indeed, the local courts, at least, will take judicial notice as of the public laws.[28]

§ 28. Relative Rights of Appropriator of Water and Grantee of Land.

As land belonging to the public domain is granted by the general government to private individuals, some conflict of claims between the grantee of the land and an appropriator of water thereon might naturally be expected. It is proposed in this and the next two sections to discuss the relative rights of the grantee and appropriator in such case. To avoid confusion of mind in reading these sections, the reader should

No. 14,370; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Beaver Brook Reservoir & Canal Co. v. St. Vrain Reservoir & Fish Co., 6 Colo. App. 130, 40 Pac. 1066.

[25] Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371.

[26] Basey v. Gallagher, 20 Wall. (U. S.) 670; Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541; Barnes v. Sabron, 10 Nev. 217.

[27] Basey v. Gallagher, 20 Wall. (U. S.) 670.

[28] Clough v. Wing (Ariz., 1888) 17 Pac. 453.

remember that in some of the arid states the doctrine of appropriation applies only to water on the public lands, and as to streams flowing by or through the lands of private persons, the rights of riparian proprietors remain as at common law; but in other states, riparian owners, as such, have no rights in the water of natural streams, but all unappropriated water, whether found on public or private land, is subject to appropriation. It should be further borne in mind that after the government title to land has been extinguished, and it has become a part of the territory of a state, and subject in all respects to its jurisdiction, the question as to whether water rights may be acquired on such land by appropriation must be determined solely by the state law. In the present discussion, we are to consider the rights of parties under the acts of congress only. The statements made in what follows should be interpreted, and, when necessary, limited, in accordance with what has just been said.

We will consider first the effect of a government grant of public land on the rights of one who has appropriated water on such land while it was yet a part of the public domain, and then what rights, if any, can be acquired under the acts of congress by appropriation after title to the land has vested in the grantee.

A grant of public land of the United States carries with it the common-law rights to the nonnavigable streams thereon, unless th ewaters are expressly or impliedly reserved by the terms of the patent, or of the statute granting the land, or by the congressional legislation authorizing the patent or other muniment of title. "To hold otherwise would be to hold not only that the lands of the United States are not taxable, and that the primary disposal of them is beyond state interference, but that the United States, as a riparian owner within the

state, has other and different rights than other riparian owners, including its own grantees."[29]

As we have already seen, however, the United States, at first by its silent asquiescence, and finally by express statutory enactment, has always recognized the doctrine of appropriation of water on the public lands, and hence it would seem to follow, as a necessary consequence, that any grants by the United States of land upon which water rights have been acquired with such implied or express permission of the government would be subject to the burden of such vested rights. This has been made the subject of an express statute, enacted July 9, 1870, as an amendment to the act of 1866. By this act it is provided that all patents granted, or preemptions allowed, are subject to any vested or accrued water rights or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the act of 1866.[30] This act, like the act of 1866, is simply declaratory of the pre-existing law.[31] Since the passage of the act of 1870, it has been repeatedly held by the courts, sometimes with, and sometimes without, express reference to the act, that one who acquires title to public land takes the same subject to any vested rights to water and ditches thereon.[32] And one who constructs a ditch, and

[29] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

[30] Rev. St. U. S. § 2340.

[31] See Broder v. Water Co., 101 U. S. 274; Hammond v. Rose, 11 Colo. 324, 19 Pac. 466, 7 Am. St. Rep. 258.

[32] United States: Cruse v. McCauley, 96 Fed. 369.

California: Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571; Farley v. Spring Valley Min. & Irr. Co., 58 Cal. 142; Lytle Creek Water Co. v. Perdew, 65 Cal. 447, 4 Pac. 426; Judkins v. Elliott (Cal.) 12 Pac. 116; South Yuba Water & Min. Co. v. Rosa, 80 Cal. 333, 22 Pac. 222; De Necochea v. Curtis,

appropriates and uses the water of a stream, upon the public land, acquires thereby, as against a subsequent purchaser from the United States, as complete and perfect a right to maintain his ditch, and have the water flow to, in and through the same, as though such right or easement had vested in him by grant.[33] And indeed it is held that the act of congress operates as a grant from the United States of the water appropriated on the public domain, and of the right of way for the ditches and canals by which it is diverted and conveyed.[34]

§ 29. Same—Appropriation Subsequent to Grant.

In the preceding section we have considered the relative rights of an appropriator of water on the public domain and a grantee of such land from the government where the appropriation was made prior to the grant. It now remains to consider the effect of an appropriation made after the title to the land has vested in the grantee, or he has acquired equitable rights therein. Clearly, in such case, the question pre-

80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. 883; McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060.

Colorado: Denver, T. & Ft. W. R. Co. v. Dotson, 20 Colo. 304, 38 Pac. 322; Beaver Brook Reservoir & Canal Co. v. St. Vrain Reservoir & Fish Co., 6 Colo. App. 130, 40 Pac. 1066.

Idaho: Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541.

Nevada: Barnes v. Sabron, 10 Nev. 217.

Oregon: Kaler v. Campbell, 13 Ore. 596, 11 Pac. 301; Tolman v. Casey, 15 Ore. 83, 13 Pac. 669; Carson v. Gentner, 33 Ore. 512, 52 Pac. 506.

South Dakota: Scott v. Toomey, 8 S. D. 639, 67 N. W. 838.

Washington: Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588; Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314.

33 Ware v. Walker, 70 Cal. 591, 12 Pac. 475.

34 Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453; Wood v. Etiwanda Water Co., 122 Cal. 152, 54 Pac. 726; Smith v. Denniff (Mont., 1900) 60 Pac. 398.

sented is, in general, the same as that involved in any other case of appropriation of water on private lands.

The practical construction of the act of 1866 has been that, as long as land belongs to the United States, the waters flowing over it are subject to appropriation for any of the purposes named in the statute, when such appropriation was recognized by the local customs, laws or decisions of the courts. But if the water was not so appropriated when it flowed over the public domain, it is not subject to appropriation after the land over which it flows has become private property.[35] The act of congress applies only to the public domain.[36] The clause contained in the United States land patents, that such patents shall be subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, means subject to such rights as existed when the patent took effect.[37] An appropriation of water on the public lands, made after the acts of 1866 and 1870, gives to the appropriator no right to the water appropriated, as against a grantee of riparian lands under a grant made or issued prior to the act of 1866, except in a case where the water so subsequently appropriated was expressly reserved by the terms of such grant.[38] Nor can such appropriation affect the rights of a grantee, where the grant was made after the act of 1866, but before the appropriation.[39]

§ 30. Same—When Rights of Grantee Attach.

It is clearly of great importance, in the application of the

[35] Cruse v. McCauley, 96 Fed. 369.

[36] Smith v. Denniff (Mont., 1900) 60 Pac. 398; Carson v. Gentner, 33 Ore. 512, 52 Pac. 506.

[37] Cruse v. McCauley, 96 Fed. 369.

[38] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674. See Vansickle v. Haines, 7 Nev. 249.

[39] See ante, § 25.

principles stated in the sections immediately preceding, to know just when the rights of a patentee from the government become vested. Where a patent to government land has been actually issued before any appropriation of water has been made on such land, the question is, of course, free from difficulty, for the rights of the patentee will have vested prior to any possible claim that may be asserted by the appropriator, whether such rights be considered as attaching at the time of taking the first steps to secure title to the land, or not until the actual issuance of the patent. But a case may arise in which the appropriation was made after the government's grantee has taken steps to secure title, but before the patent is issued. In such case, it is of vital importance to determine whether the grantee has any rights before securing the patent. So far as the question has been presented for judicial determination, the courts have uniformly held that in such case, where the grantee has done all that is required of him to entitle him to a patent, which is subsequently issued to him, his rights will relate back at least to the time when his compliance with the statutory requirements was complete.[40] And although the contrary was previously held in California and Washington,[41] it is now settled by a decision of the supreme court of the United States that, in such case,

[40] Union Mill & Min. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370.

[41] Farley v. Spring Valley Min. & Irr. Co., 58 Cal. 142; Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588; Ellis v. Pomeroy Imp. Co., 1 Wash. 572, 21 Pac. 27.

The case of Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571, although it appears to hold that a grantee's rights date only from the issuance of his patent, was decided upon the peculiar facts of that case, and does not conflict with the doctrine stated in the text.

the rights of the patentee will relate back to the date of his initiatory act to acquire title, and will cut off any intervening adverse claims to water rights.[42] Moreover, the rights of a settler will be protected as against an appropriator of water, although he has not yet secured a patent. Thus, in a recent California case, the facts were as follows: A person intending to appropriate the water of a spring on certain surveyed public lands, posted a notice of appropriation, which, however, by reason of its failure to conform to the requirements of the state statute as to notice, was invalid and conferred no rights. On the same day he made an excavation in the spring for the purpose of marking the place of his intended diversion, and a few days later bought materials for making the diversion, but did not complete it. In the meanwhile, another settled upon the land where the spring was located, built a house thereon, and filed an affidavit in conformity of the state possessory act. After possession had been so taken, the appropriator attempted to complete his diversion, but was prevented by the settler from doing so, and thereupon brought an action against the latter to enjoin him from interfering with the completion of the diversion. It was held that the action could not be maintained.[43]

[42] Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, affirming 6 Dak. 71, 50 N. W. 486; McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060; Faull v. Cooke, 19 Ore. 455, 26 Pac. 662, 20 Am. St. Rep. 836.

See, also, Cruse v. McCauley, 96 Fed. 369; City of Denver v. Mullen, 7 Colo. 345, 3 Pac. 693; Scott v. Toomey, 8 S. D. 639, 67 N. W. 838; Benton v. Johncox, 17 Wash. 277, 49 Pac. 495.

[43] Taylor v. Abbott, 103 Cal. 421, 37 Pac. 408.

III. What Water may be Appropriated.

§ 31. General Statement—Natural Streams Subject to Appropriation.

The statutes or constitutional provisions by which the right of appropriation is conferred or confirmed define in general terms the water in respect to which the right may be exercised. The provisions are necessarily very similar, extending the right either to the rivers and streams, sometimes qualified as "natural streams," of the state, or to running water flowing in a river or stream, or down a canyon or ravine.[44]

§ 32. What Constitutes a Stream or Watercourse.

To constitute a stream or watercourse, in the sense contemplated in the present section, there must be water naturally and usually flowing in a definite direction, and in a well-defined bed or channel. It is not necessary that the flow should be continuous and uninterrupted. The channel may, in certain seasons, be dry, either from total failure of water, or by reason of the sinking of the water into the ground, so as to form a subterraneous stream.[45] But the water must flow in a definite channel. Water descending from the hills, without any definite channel, and only in times of rain or melting snow, does not constitute a stream or watercourse.[46] It is not essential, however, that the banks should be unchangeable, or

44 See Appendix.

45 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Gillett v. Johnson, 30 Conn. 180; Barnes v. Sabron, 10 Nev. 217; Simmons v. Winters, 21 Ore. 35, 27 Pac. 7; Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314; Case v. Hoffman, 84 Wis. 438, 54 N. W. 793.

46 Simmons v. Winters, 21 Ore. 35, 27 Pac. 7. In this case, Lord, J., after reviewing the authorities, said: "The conclusion to be deduced from these decisions is that a water course is a stream of water usually flowing in a particular direction, with well-defined banks and channels, but that the water need not flow continuously,—the channel may sometimes be dry; that the term

that there should always be everywhere a visible change in the angle of ascent marking the line between bed and banks. Nor does the fact that along the course of the stream there may be shallow places where the water spreads, and where there is no distinct ravine or gully, affect its character as a watercourse.[47]

To illustrate these principles: It has been held that water flowing from springs may be appropriated by means of a ditch taking the water directly from the spring.[48] The fact that a stream has its source in a flowing spring does not change its nature, or exempt its waters from appropriation.[49]

A ditch through which the waters of a natural stream are diverted, although consisting partly of natural ravines or depressions caused by occasional bodies of surface water descending from the hills during times of melting snow and ice, is not a watercourse.[50]

'water course' does not include water descending from the hills, down the hollows and ravines, without any definite channel, only in times of rain and melting snow, but that, where water, owing to the hilly or mountainous configuration of the country, accumulates in large quantities from rain and melting snow, and at regular seasons descends through long, deep gullies or ravines upon the lands below, and in its onward flow carves out a distinct and well-defined channel, which, even to the casual glance, bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, such a stream is to be considered a watercourse, and to be governed by the same rules."

47 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

See, also, West v. Taylor, 16 Cal. 165; Gillett v. Johnson, 30 Conn. 180.

48 Cross v. Kitts, 69 Cal. 217, 10 Pac. 409, 58 Am. Rep. 558; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587; Taylor v. Abbott, 103 Cal. 421,

In Colorado, under a particular statute, it has been held that a valid appropriation may be made from a canon not a running stream, but supplied with water entirely from the rainfall in the surrounding hills.[51]

§ 33. Percolating Waters and Subterranean Streams.

Percolating waters have ordinarily no legal existence apart from the soil in which they occur, and therefore are not subject to appropriation for irrigation or other purposes.[52] But where waters collect or are gathered in a stream flowing underground in a defined channel, no distinction exists between such subsurface streams and streams flowing upon the surface. They are such property or incidents to property as may be acquired by grant or by appropriation, and when rights in them are so acquired, the owner cannot be divested thereof by the wrongful acts of another.[53]

This principle is of great importance when applied to the appropriation of water from well-defined surface streams in the arid region. As is well known, it frequently happens that a great, and perhaps the greater, part of the volume of the streams in this region passes slowly through the sand and gravel beneath the bed of the stream as a subsurface stream or underflow. These subterraneous streams may flow constantly throughout the year, while the surface stream, run-

37 Pac. 408; Williams v. Harter, 121 Cal. 47, 53 Pac. 405.

49 Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314.

50 Simmons v. Winters, 21 Ore. 35, 27 Pac. 7.

51 Denver, T. & Ft. W. R. Co. v. Dotson, 20 Colo. 304, 38 Pac. 322.

52 Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Houston v. Leach, 53 Cal. 262; Southern Pac. R. Co. v. Dufour, 95 Cal. 615, 30 Pac. 783; Willow Creek Irr. Co. v. Michaelson (Utah, 1900) 60 Pac. 943. See, also, Painter v. Pasadena Land & Water Co., 91 Cal. 74, 27 Pac. 539.

ning full in times of high water, in times of drought may wholly disappear in places, leaving the bed of the stream dry, or marked by pools of standing water. So far as the right of appropriation is concerned, there is no difference between the water flowing on the surface and the underflow, passing beneath the bed of the stream.[54] One may, by appropriate works, develop and secure to useful purposes the subsurface flow of the stream, and, by so doing, become the legal appropriator of the water, provided he does not thereby interfere with the rights of other persons in the water of the stream.[55] But where the effect of such works is to decrease the surface flow, already fully appropriated by others, the latter will be entitled to an injunction restraining the later appropriators from asserting any right to the waters, and from developing or extending their works.[56]

§ 34. Navigable Streams.

There seems to be no reason why, under the terms of the statutes authorizing appropriation, water may not be appropriated from navigable as well as from nonnavigable streams, so long as the character of the stream as a navigable stream is not thereby affected. The number of navigable streams in the arid region being small, the precise question as to the right to appropriate water therefrom has been seldom considered.

The matter has been discussed in a recent case in the United States supreme court. It was in this case held that the

53 Cross v. Kitts, 69 Cal. 217, 10 Pac. 409; Vinland Irr. Dist. v. Azusa Irr. Co. (Cal. 1899) 58 Pac. 1057; McClellan v. Hurdle, 3 Colo. App. 430, 33 Pac. 280; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497; Keeney v. Carillo, 2 N. Mex. 480.

54 Vinland Irr. Dist. v. Azusa Irr. Co. (Cal., 1899) 58 Pac. 1057;

power of a state to authorize the appropriation of water is limited to the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States; that the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needful measures to preserve the navigability of the navigable watercourses of the country, even as against any state action; that the acts of congress recognizing and assenting to the appropriation of water, and providing for the reclamation of arid lands, were not intended to act as a release by congress of its control over the navigable streams of the country, or to confer upon any state the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, so as to destroy its navigability. The precise point raised in the case was whether the United States, by the attorney general, might restrain an irrigation company from constructing a dam across the Rio Grande river, in the territory of New Mexico, and appropriating the waters of that stream for the purpose of irrigation. It was found that the river was not navigable within the territory, but was navigable farther down, in the state of Texas. It was held that the construction of the dam should be restrained if and to the extent that it would substantially diminish the navigability of the stream, but that, when proceedings for this purpose are instituted, it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to interfere with the navigability of the stream, in which case only, the courts would be justified in sustaining any proceed-

McClellan v. Hurdle, 3 Colo. App. 430, 33 Pac. 280; Platte Val. Irr. Co. v. Buckers Irr., Mill & Imp. Co., 25 Colo. 77, 53 Pac. 334.

ing to restrain any appropriation of the upper waters of a navigable stream.[57] It would seem that water might be appropriated from navigable streams, provided this does not interfere with their navigability.[57a]

IV. Who may Appropriate Water.

§ 35. Who may Appropriate Water.

The acts of congress governing the appropriation of water impose no restrictions as to who may make an appropriation. The state statutes by which the right of appropriation is granted in some instances extend such right to all persons who have title or a possessory right to the land to be irrigated, while in other cases the right is granted absolutely, the statutes being silent as to the persons by whom it may be enjoyed.[58] In the case of the public domain, it is not essential that the appropriator should have acquired,[59] or have the right to acquire, title to the land upon which the water is to be used, and an alien may make a valid appropriation of water on the public land, although he may be incompetent to acquire title to the land itself.[60] And an alien may acquire and hold a ditch and water right until office found, as against col-

[55] Vinland Irr. Dist v. Azusa Irr. Co. (Cal., 1899) 58 Pac. 1057.

[56] Id.

[57] U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 19 Sup. Ct. 770.

The court held that the facts of the case brought it within the provisions of the act of September 19, 1890 (26 Stat. p. 454, § 10), prohibiting the obstruction of navigable waters. See this case, also, for a discussion as to how far a court may take judicial notice that a river is or is not navigable.

[57a] See Barrett v. Metcalfe, 12 Tex. Civ. App. 247, 33 S. W. 758.

[58] See statutes in Appendix.

[59] A rightful occupant of public land may appropriate water

lateral attacks by third persons other than the government, and, in the absence of forfeiture of office found, may convey title to his grantee.[61] So, also, an alien may acquire a right to the use of water for irrigation from a citizen by whom it was appropriated.[62]

A valid appropriation of water on the public domain may be made by an Indian, who may maintain an action for the diversion of such water, and may transfer his rights to others.[63]

Water may be appropriated by one in the rightful possession of private land, although not the owner thereof. Thus, a tenant in possession of land, belonging to another under a contract with the owner may divert and appropriate water for use on such land.[64] But it seems that a valid appropriation cannot be made by a mere trespasser on the land.[65]

V. How Water is Appropriated.

§ 36. The Elements of a Valid Appropriation.

Having discussed and defined the right of appropriation so far as the general question of its existence is concerned, we will now consider how an appropriation of water may be effected. We observe first that, to constitute a valid appropriation of water, there must be an actual diversion of the water

thereon, although he has no title to the land, and although the land be unsurveyed. Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587.

60 Santa Paula Water Works v. Peralta, 113 Cal. 38, 45 Pac. 168. See, also, Toohey v. Campbell (Mont., 1900) 60 Pac. 396.

In Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588, it was held the statutes of Washington territory of 1873, extending the right of appropriation to landowners, do not affect the rule previously established by the local customs and decisions of the courts, that the right of appropriation might be exercised without regard to the question of ownership of the land.

from the natural stream or other source of supply, with the intent to apply it to some beneficial use, followed by an actual application of the water to the use designed, or to some other useful purpose, within a reasonable time.[66] "An appropriation is an intent to take, accompanied by some open physical demonstration of the intent, and for some valuable use."[67]

Besides the several steps necessary to constitute an actual physical appropriation of water, some preliminary steps, such as posting and recording a notice, are in some states required, not so much as constituting a part of the act of making an appropriation, as for the purpose of fixing the rights of the appropriator. The present chapter will be devoted to a consideration of such preliminary requirements, as well as the further steps necessary to acquire and hold a water right by appropriation.

§ 37. Notice of Appropriation—Posting and Recording Notice.

In several of the arid states, statutes have been enacted requiring a person desiring to appropriate water to post a notice in writing in a conspicuous place at the point of intended diversion, stating therein that he claims a certain designated quantity of the water, the purpose for which he claims it, and the place of intended use, and the means by which he intends to divert it. A copy of this notice must be recorded within a prescribed number of days after it is posted, in the office of county recorder of the county in which the notice is

61 Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741.

62 Lavery v. Arnold (Ore., 1899) 57 Pac. 906.

63 Lobdell v. Hall, 3 Nev. 516.

64 Smith v. Denniff (Mont., 1899) 57 Pac. 557, reversed on other points in 60 Pac. 398.

65 See Smith v. Logan, 18 Nev. 149, 1 Pac. 678; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217.

posted. Such statutes are in force in Arizona, California, Idaho, Kansas, Montana, Nebraska, Utah and Washington.[68] In California, and probably other states, the posting of such a notice was required by local customs prior to any legislation on the subject.[69] Such is now the case in Oregon, in which state there is no statute requiring notice.[70] When required, whether by statute or local custom, the posting of a notice is the first step in making an appropriation. A statute as to notice is to be construed strictly, and rights can be acquired under it only by strict compliance with its terms.[71]

A notice of appropriation, and the record of such notice when required, is evidence of the facts stated therein,[72] but

[66] Low v. Rizor, 25 Ore. 551, 37 Pac. 82; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 15 Pac. 472. And see the sections immediately following.

[67] Larimer Co. Reservoir Co. v. People, 8 Colo. 614, 9 Pac. 794; Ft. Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 Pac. 1032, both quoting McDonald v. Bear River & Auburn Water & Min. Co., 13 Cal. 220. See, also, Offield v. Ish (Wash., 1899) 57 Pac. 809.

[68] See statutes in Appendix.

In New Mexico no notice is required. Millheiser v. Long (N. M., 1900) 61 Pac. 111.

[69] See Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571.

It seems to have been customary to post a notice in Arizona prior to the statute of 1893. See Dyke v. Caldwell (Ariz., 1888) 18 Pac. 276.

In Montana, prior to the passage of the act of March 12, 1895, requiring notice, etc., no notice of location or record of appropriation was required. Murray v. Tingley, 20 Mont. 260, 50 Pac. 723.

[70] See Ole v. Logan, 24 Ore. 304, 33 Pac. 568; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. 472.

[71] Murray v. Tingley, 20 Mont. 260, 50 Pac. 773; Umatilla Irr. Co. v. Umatilla Imp. Co., 22 Ore. 366, 30 Pac. 30.

[72] Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. 128.

the record of a notice, where there is no law authorizing the recording of such notice, is of no force or validity. It imparts no notice, and is not a step in making the appropriation. A certified copy of such record is therefore not admissible in evidence.[73]

The posting of a second notice is not an abandonment, but an assertion of the original claim, where the appropriator has diligently pursued the work of appropriation.[74]

§ 38. Same—What is a Sufficient Notice.

A notice of appropriation should, of course, contain all the recitals called for by the statute, and the posting of a notice which does not conform to the requirements of the statute confers no rights upon the person posting it as an appropriator of the water claimed.[75] But a substantial compliance with the statute will be sufficient. No particular form of notice is required, and it seems that the notice is sufficient if it contains enough to put other persons on inquiry as to the rights of the party posting it. Notices are liberally construed in favor of the party by whom they are posted.[76]

39. Same—Appropriation Without Posting of Notice.

The statutes requiring the posting of a notice expressly provide that, by a compliance with the requirements as to posting the notice, and actually diverting and using the water, the right of the claimant or appropriator to the use of the water shall relate back to the time of posting the notice, but that a failure to comply with these requirements deprives the

[73] Cruse v. McCauley, 96 Fed. 369.

[74] Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571.

[75] Taylor v. Abbott, 103 Cal. 421, 37 Pac. 408.

[76] Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571; Floyd v. Boulder Flume & Mercantile Co., 11 Mont. 435, 28 Pac. 450.

claimant of the right to the use of the water as against a subsequent claimant, who complies therewith. Several cases have arisen in which the rights of actual appropriators, who have not complied with the requirements of the statute, have been adjudicated. To determine rightly the effect of noncompliance with the statutes, it is important to keep in mind the purpose of the legislatures in enacting the statutes. Prior to the passage of these acts, the actual diversion of water, and its application within a reasonable time to a beneficial use, constituted a valid appropriation of water, and it was the well-established rule that, where the appropriator pursued the work of appropriation with reasonable diligence, his rights related back to the time of commencing the work. Thus, as between two appropriators diverting water at the same time, prosecuting the work with reasonable diligence to completion, and the one who first began work had the prior right, although the other may have completed his work first. This is known as the doctrine of "relation back," which will be further considered in a subsequent section.[77]

Questions of priority under this rule, as well as of the original capacity, etc., of ditches, depended chiefly on oral testimony,—that is, on the memory of eye witnesses, often at fault through lapse of time,—so that confusion and insecurity of vested rights resulted. It was to obviate this confusion and insecurity that the statutes were enacted. Notice was required to be posted at the place of intended diversion, to apprise others who contemplated the acquisition of water rights from the same stream that the claimant posting the notice had taken the initial step in making his appropriation, while a record of such appropriation was required in order to pre-

[77] See post, § 51.

serve reliable evidence of the appropriator's rights. It was not intended that one who failed to comply with the statutory requirements, but who, in the absence of any conflicting adverse right, had actually diverted water, and put it to beneficial use, should acquire no title thereby. The statutes did not change the rule as to what constitutes an appropriation, but their object was simply to preserve evidence of the appropriator's rights, and to regulate the doctrine of relation back.[78]

In accordance with these principles, it is held that one who fails to comply with the statutory requirements, but who actually diverts water and applies it to a beneficial use, in the absence of any conflicting adverse claim, acquires a valid title thereto, which cannot be divested by another appropriator, who complies with the terms of the statute after the former has completed his appropriation.[79] In such case, however, the completion, and not the commencement, of the work of appropriation determines the time when the right of the appropriator becomes vested; and as between two appropriators, neither of whom has complied with the statute, the one who first completes his ditch and uses the water has the superior right, although the other may have commenced work first.[80] As to the effect of the statutes then we observe that, where the statutory requirements have been complied with, the law of relation is the same as it was prior to the statutes, but the stat-

[78] See opinion of Buck, J., in Murray v. Tingley, 20 Mont. 260, 50 Pac. 723.

[79] De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Burrows v. Burrows, 82 Cal. 564, 23 Pac. 146; Wells v. Mantes, 99 Cal. 583, 34 Pac. 324; Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. 432; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Murray v. Tingley, 20 Mont. 260, 50 Pac. 723.

[80] Murray v. Tingley, 20 Mont. 260, 50 Pac. 723.

utes provide for the preservation of evidence of the appropriator's rights. But where the statutory requirements have not been complied with, the rights of the appropriator, which, but for the statutes, would relate back to the commencement of the work of appropriation, relate back only to the completion of the work; this being the only change wrought in the law by the statutes.

§ 40. Filing Map and Statement of Appropriation.

In several of the arid states, statutes have been passed requiring the appropriator to file for record certain evidence of his appropriation, for the purpose of fixing his priority. The performance of these requirements, like the posting and filing of a notice, is not strictly a part of the act of appropriation, but is rather a means of fixing and holding the rights already acquired by appropriation. Such statutes are found in Colorado, Montana and Texas.[81] The Colorado statute, after having been several times before the court for construction, was in a late case held unconstitutional and void on account of the insufficiency of the title, under the provision of the state constitution that no bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title.[82]

[81] Colorado: Mills' Ann. St. §§ 2265, 2266.
Montana: Civ. Code, § 1889.
Texas: Supp. Sayles' St. art. 3000a, § 5.
See Appendix for text of these statutes.
It may be noted that in Colorado and Texas there is no statute requiring the posting of a notice of appropriation, but such a statute is in force in Montana.

[82] Lamar Canal Co. v. Amity Land & Irr. Co. (Colo., 1899) 58 Pac. 600, followed in Rio Grande Land & Canal Co. v. Prairie Ditch Co. (Colo., 1900) 60 Pac. 726.

The section in question is the second section of an act passed in 1881, and was amended in 1887. The court in its opinion did not refer to the fact of amendment in any way, and it is doubtful whether such amendment may be considered as having any bearing on the question of the constitutionality of the act, and the original act and this section as amended are therefore both void; for the section can derive no validity as a new statute from the title of the amending act, since this is merely an embodiment of the original title.

The object of this statute being simply to fix the priority of appropriations, it was held that the want of the required record could not be invoked to justify the destruction of a ditch owned by and in the actual occupation and use of another.[83] The statute, as construed, applied only to ditches taking water directly from a natural stream, and not to ditches tapping other ditches.[84]

The Montana statute requires persons who have acquired water rights prior to the passage of the act, within six months after the publication thereof, provided a notice of appropriation be not already on record, to file a verified declaration reciting the same facts as required in a notice, but contains a proviso that a failure to comply with such requirements shall not work a forfeiture of rights already acquired, nor prevent the claimant from establishing such rights in the courts. The aim of the legislature in enacting this statute seems to have been to require water rights to be recorded as provided in the statute, and to have precedence according to the date of actual appropriation, to be shown prima facie by the verified

83 Denver, T. & Ft. W. R. Co. v. Dotson, 20 Colo. 304, 38 Pac. 322.

84 Water Supply & Storage Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. 496.

and recorded declaration of the claimant, and also, without resorting to the harshness of attempting to forfeit or impair prior rights, to induce the claimants of such rights to record the same, to the end that they might become more certainly fixed and settled, and the evidence thereof be preserved. Under this act, it is held that a water right acquired by appropriation prior to the passage of the act, but not recorded until several years later, is superior to one acquired and recorded after the first appropriation, but before the latter is recorded.[85] Certified copies of such declarations have been held competent evidence on the question of priority of water rights, although the declarations were executed and recorded prior to the passage of the act requiring such record of appropriations.[86]

§ 41 Diversion of Water—Water must be Diverted Within a Reasonable Time.

The appropriator, in order to secure and hold the rights claimed by him, must accomplish the actual diversion of the water by means of ditches or otherwise within a reasonable time after the first assertion of his claim.[87] The statutes requiring notice generally provide that the work of diversion must be commenced within a specified number of days after the notice is posted, and prosecuted diligently and uninterruptedly to completion.[88] Where there is no statutory re-

85 Salazar v. Smart, 12 Mont. 395, 30 Pac. 676.

86 Sweetland v. Olsen, 11 Mont. 27, 27 Pac. 339.

87 Cruse v. McCauley, 96 Fed. 369; Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571; Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. 153; Keeney v. Carillo, 2 N. Mex. 480; Cole v. Logan, 24 Ore. 304, 33 Pac. 568; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. 472; Smyth v. Neal, 31 Ore. 105, 49 Pac. 850.

88 Consult statutes in Appendix.

quirement as to the time within which the appropriator must begin or complete the work of diversion, he has a reasonable time therefor after posting the notice.[89]

What is a reasonable time for the completion of the work will evidently depend on circumstances. The law does not require any unusual or extraordinary efforts on the part of the appropriator, but only what is usual, ordinary and reasonable. The appropriator must exercise that degree of diligence which will indicate the constancy and steadiness of purpose and labor usual with men engaged in like enterprises, who desire a speedy accomplishment of their designs, and will manifest to the world a bona fide intention to complete the work without unnecessary delay.[90]

In determining whether the appropriator has exercised due diligence in a particular case, it is proper to consider the magnitude and nature of the work, and the difficulties and obstacles to be overcome.[91] Due allowance should be made for delays occasioned by the inclemency of the weather.[92] But the appropriator's personal circumstances have no bearing on the question. Thus, he cannot plead his ill health or lack of pecuniary means in excuse for his failure to complete the

[89] Cruse v. McCauley, 96 Fed. 369; Dyke v. Caldwell (Ariz., 1888) 18 Pac. 276; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. 472; Smyth v. Neal, 31 Ore. 105, 49 Pac. 850.

A delay of ten months after posting the notice before constructing a ditch half a mile long has been held unreasonable. Cruse v. McCauley, 96 Fed. 369.

[90] Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534; Cole v. Logan, 24 Ore. 304, 33 Pac. 568.

[91] See Water Supply & Storage Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. 496; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. 472.

[92] It is so provided by statute in several states.

work of diversion within a reasonable time.[93] Although this rule may sometimes work a hardship upon the individual appropriator, its justice seems unquestionable, and the hardship suffered is simply one of those evils necessarily attendant upon poverty and ill health. If the rule were otherwise, a person in poor health, or without means, owning land near a stream, by posting a notice, making a survey, or otherwise, might establish a claim to the water of the stream for irrigation purposes, and, by doing such work as his health or means would permit, might ultimately divert the water, and acquire a right thereto, without regard to the rights of other persons equally in need of the water, who might be ready and in a position to put it to immediate use. The use of the water might thus be postponed for an indefinite period, and the first appropriator be enabled to keep others from using the water which he could not use himself, and might in fact never put to beneficial use.[94]

93 Keeney v. Carillo, 2 N. Mex. 480; Cole v. Logan, 24 Ore. 304, 33 Pac. 568.

A leading case in this connection is Ophir Silver Min. Co. v. Carpenter, 4 Nev. 534, in which Lewis, C. J., in holding that the illness of an appropriator of water was not to be taken into consideration in determining whether the work of diversion was prosecuted with due diligence, said: "Like the pecuniary condition of a person, it is not one of those matters incident to the enterprise, but rather to the person. The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers, or something of that character. It would be a most dangerous doctrine to hold that ill health or pecuniary inability of a claimant of a water privilege will dispense with the necessity of actual appropriation within a reasonable time, or the diligence which is usually required in the prosecution of the work necessary for the purpose."

94 See Cole v. Logan, 24 Ore. 304, 33 Pac. 568.

Tó illustrate these principles: Some pioneers of limited means and facilities posted a notice of appropriation in the early summer, and shortly afterwards began the actual work of diversion. By the next spring they completed the first section of their ditch, two miles in length, and prosecuted the work on the second section until the irrigating season of the next year, when the work was discontinued to permit the completed portion to be used. In the fall, work was resumed, and the whole ditch, nine miles in length, was completed and in use the next spring, or a little less than three years after the notice was posted. It was held that the work was prosecuted with reasonable diligence.[95]

On the other hand, where appropriators began the diversion of water, discontinued the work for want of means and time, and others, within the next year, made a new appropriation, and completed the work of diversion, it was held that the first appropriators had failed to prosecute the work with due diligence.[96]

§ 42. Same—Modes of Diverting and Conducting Water.

Water is usually diverted from the stream or reservoir by means of open ditches or canals. These are sometimes lined with wood, stone or cement, to prevent waste of water, and in some cases sections of the conduit may be constructed wholly of such materials. In various parts of the country pipes are employed to a considerable extent to prevent loss of water, especially at points where it is difficult to maintain an open channel. These pipes are usually made of wood or sheet iron, or frequently, where frosts are not to be feared, of

95 Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. 472.
96 Keeney v. Carillo, 2 N. Mex. 480.

stoneware or cement.[97] The mode of diverting and conducting the water is wholly immaterial,[98] and the irrigator may employ any means best suited to the existing physical conditions, and all the circumstances of the case, though undoubtedly he will be required to employ reasonably economical means, so as to prevent unnecessary waste.

When ditches and flumes are the usual and ordinary means of diverting water, parties who have made their appropriations by such means cannot be compelled to substitute iron pipes, though they will be required to prevent unnecessary waste by keeping their ditches and flumes in good repair.[99]

Where the water cannot be made to flow to the place desired by gravity alone, it may be raised from the stream by means of pumps, in order to obtain the necessary fall.[100]

§ 43. Same—Use of Natural Channel or Ravine as Part of Ditch

An appropriator may use any dry ravine, gulch or natural hollow or depression in lands as a part of his ditch for conducting the water appropriated.[101] So, also, he may turn

97 See Census Report on Agriculture by Irrigation, 1890, p. 19.

98 Thomas v. Guiraud, 6 Colo. 530.

99 Barrows v. Fox, 98 Cal. 63, 32 Pac. 811.

100 Earl of Norbury v. Kitchin, 7 Law Times (N. S.) 685; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. 171. These two cases involved the right of a riparian proprietor to raise the water from a stream by pumping, but there can be no difference in this respect between the right of a riparian proprietor and an appropriator. The use of pumping machinery for this purpose is common throughout the arid region.

101 Hoffman v. Stone, 7 Cal. 46; Simmons v. Winters, 21 Ore. 35, 27 Pac. 7.

In Hoffman v. Stone, 7 Cal. 46, the plaintiffs, who were the owners of a ditch which received its supply of water from a gulch dry

the water into a natural watercourse,—either the lower portion of the same bed or channel from which the water was taken, or the channel of another stream,—for the purpose of conducting it to the place of use.[102] By so turning the water into a natural watercourse, he does not abandon or lose his right to the water, but may take out of the stream the same quantity of water that he has turned in.[103] But he cannot divert more water than he has turned into the stream, to the prejudice of other appropriators or lower riparian proprietors;[104] and it has been held that the diversion of any water by him may be enjoined by a riparian owner below, unless he can show that he has not taken from the stream more water than he has led to it.[105]

at certain seasons of the year, brought an action to restrain the defendants from diverting the water of the gulch. It appeared that the defendants had turned water from one of their ditches into the gulch, and used it to conduct the water to another ditch. The water diverted by both plaintiffs and defendants was used for mining purposes. It was held the plaintiffs were entitled to no relief; that the water turned into the gulch by the defendants was not abandoned by them, and that they had a right to use the gulch for conducting water, so long as they did not infringe the rights of prior appropriators therefrom whose appropriation of the water that might flow in the gulch did not give them the exclusive use of the bed.

102 Hoffman v. Stone, 7 Cal. 46; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. 108; Paige v. Rocky Ford Canal & Irr. Co. 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875. See, also, Ellis v. Tone, 58 Cal. 289.

103 Paige v. Rocky Ford Canal & Irr. Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875. See Ellis v. Tone, 58 Cal. 289; Schulz v. Sweeney, 19 Nev. 359, 11 Pac. 253.

The following mining cases sustain the text: Hoffman v. Stone, 7 Cal. 46; Butte Canal & Ditch Co. v. Vaughan, 11 Cal. 143.

104 Wilcox v. Hausch, 64 Cal. 461, 3 Pac. 108; Paige v. Rocky Ford Canal & Irr. Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875.

105 Wilcox v. Hausch, 64 Cal. 461, 3 Pac. 108. See Butte Canal & Ditch Co. v. Vaughan, 11 Cal. 143.

The appropriator who desires to use the natural channel of a stream to convey water may clean out the channel, and remove obstructions therefrom,[106] but he has no right to make any such changes in the natural channel as will injure subsequent appropriators of the water.[107] And it has been held that where, for the purpose of using the natural channel to convey water turned into it by him, the appropriator removes obstructions so as to increase the natural flow of the stream to the land of a lower proprietor, such increase inures to the benefit of the lower proprietor having a right to the natural flow of the stream, and not to the person removing the obstructions, and this, although the obstructions had cut off the entire flow of the stream, except during high water.[108]

§ 44. Same—Use of Ditch Constructed by or Belonging to Another.

It is of course necessary to the creation and preservation of a water right for the appropriator to provide means for the continual diversion of the water from its natural channel, and for conducting it to the place of use, and he cannot, for this purpose, arbitrarily seize and use a ditch belonging to another.[109] But he may use another's ditch for this purpose with the consent of the owner. A ditch owner may grant to another the right to take water for irrigation through or from his ditch, and to construct gates and dams for the purpose of diverting it.[110] The fact that an appropriation is made by

106 Paige v. Rocky Ford Canal & Irr. Co. 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875.

107 Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537.

108 Paige v. Rocky Ford Canal & Irr. Co. 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875.

109 McPhail v. Forney, 4 Wyo. 556, 35 Pac. 773.

110 Water Supply & Storage Co. v. Larimer & Weld Irr. Co., 24

diverting the water from a ditch belonging to another person, and not by taking it directly from the natural stream, does not affect the validity of the appropriation.[111]

In Colorado, the right to use the ditch of another in certain cases is secured by statute, and may be acquired by condemnation in a proper case.[112] When, for the purpose of using another's ditch, it becomes necessary to enlarge or improve the ditch, and this is done with the consent or permission of the owner, the person so enlarging or improving the ditch acquires thereby a vested right to its use, which cannot be revoked or denied by the owner.[113]

Where a ditch is constructed on government land, the person constructing it becomes the owner of the ditch, and remains such as long as he uses the ditch for irrigating purposes; but when he ceases to use the ditch for transporting water, the title to it reverts to the government, or to the person who may, in the meantime, have acquired the government title in fee to the land upon which the ditch is built. The owner of the ditch has only a qualified title, which will be defeated by his failure to use it for the purpose for which it was constructed.[114] If one who desires to appropriate the water of a stream on the public land finds a ditch already constructed to hand, and takes peaceable possession thereof, and appropriates the water by means of the ditch, he thereby acquires a right to the water thus appropriated, and an ease-

Colo. 322, 51 Pac. 496; North Point Consol. Irr. Co. v. Utah & S. L. Canal Co. 16 Utah, 246, 52 Pac. 168.

111 Water Supply & Storage Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. 496.

112 Id. See Mills' Ann. St. § 2263.

113 Chicosa Irr. Ditch Co. v. El Moro Ditch Co., 10 Colo. App. 276, 50 Pac. 731; Lehi Irr. Co. v. Moyle, 4 Utah, 327, 9 Pac. 867.

114 Lehi Irr. Co. v. Moyle, 4 Utah, 327, 9 Pac. 867.

ment or right of way over the public land traversed by the ditch, good against all the world except the true owner, or those holding under or through him. He may avail himself of the medium of appropriation thus furnished, without being liable to persons having no interest in or connection with it; but to the owner of the ditch thus possessed and used the appropriator must account until his possession and use ripen into a title by prescription or adverse use. His right in such case will depend for priority, as against other appropriators of water from the same stream, upon the date of his possession and appropriation, and not upon the date of the original construction of the ditch, and appropriation by some other person, under whom he does not hold, and between whom and himself there is no priority of estate. His is an entirely new and independent appropriation.[115]

Where the original owner has abandoned the ditch, and it has gone to ruin, a later appropriator may take possession of and reconstruct the ditch for his own appropriation; and if the ditch, as reconstructed, is of less capacity than before, the rights of the new owner are limited, as against subsequent patentees of the land from the government, to the capacity of the ditch as reconstructed, and he cannot, as against them, subsequently enlarge the ditch to its original capacity.[116]

§ 45. Same—Diversion must be with Intent to Use Water for a Beneficial Purpose.

It is well settled that a mere diversion of a quantity of water from a stream is not a legal appropriation of it. The intention of the claimant is a most important factor in deter-

115 Utt v. Frey, 106 Cal. 392, 39 Pac. 807.
116 Jatunn v. O'Brien, 89 Cal. 57, 26 Pac. 635.

mining the validity of his appropriation. The water must not only be diverted from the stream, but the diversion must be for some useful purpose, existing in the mind of the appropriator.[117] Thus, one who has diverted more water than he needs for the purposes for which the diversion was made, and permits the excess to run to waste over his land, without any intention of applying it to the irrigation of the land, acquires no right to such excess.[118] So, also, the diversion of water for drainage, without any intention to apply it to a beneficial use, is not a valid appropriation thereof.[119] Moreover, the privilege of diverting the water of natural streams exists only for uses truly beneficial, and not for purposes of speculation. Thus, an irrigation company will not be per-

[117] Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966; Power v. Switzer, 21 Mont. 523, 55 Pac. 32; Toohey v. Campbell (Mont., 1900) 60 Pac. 396.

[118] Power v. Switzer, 21 Mont. 523, 55 Pac. 32. In this case, Hunt, J., said: "It has been a mistaken idea in the minds of many, not familiar with the controlling principles applicable to the use of water in arid sections, that he who has diverted, or 'claimed' and filed a claim of, water for any number of given inches, has thereby acquired a valid right, good as against all subsequent persons. But, as the settlement of the country has advanced, the great value of the use of water has become more and more apparent. Legislation and judicial exposition have accordingly proceeded with increasing caution to restrict appropriations to spheres of usefulness and beneficial purposes. As a result, the law, crystallized in statutory form, is that an appropriation of a right to the use of running water flowing in the creeks must be for some useful and beneficial purpose, and when the appropriator, or his successor in interest, abandons and ceases to use the water for such purpose, the right ceases."

[119] Thomas v. Guiraud, 6 Colo. 530. See the mining cases. Maeris v. Bicknell, 7 Cal. 261, 10 Cal. 217, and McKinney v. Smith, 21 Cal. 374.

mitted to divert water without limit as a matter of speculation and monopoly, and impose upon consumers unreasonable conditions, or exact from them exorbitant rates for the use of the water.[120]

But while the water must be diverted with the intent to apply it to some beneficial use, it is not necessary, to constitute a valid appropriation, that it should be diverted for any particular use, and the use to which the water is put may be changed without the appropriator losing his right thereto. That is, water appropriated for one purpose may be afterwards used for another purpose.[121] Thus, water appropriated for irrigation may be used for other purposes by one who succeeds to the rights of the appropriator.[122]

§ 46. Same—Change of Point or Means of Diversion.

As has been stated in a previous section, the mode by which the diversion of the water is effected is immaterial,[123] and it necessarily follows that any change in the mode of diversion, either as to the point at which the water is taken from the stream, or the means by which it is conveyed to the place of use, will not affect the rights of the appropriator. It is accordingly held that a person who has made a lawful appropriation of water for the purpose of irrigation may change the place of diversion without losing his right of pri-

120 Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966; New Mercer Ditch Co. v. Armstrong, 21 Colo. 357.

121 Davis v. Gale, 32 Cal. 27; Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41; Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. 451; Power v. Switzer, 21 Mont. 523, 55 Pac. 32; Trambley v. Luterman, 6 N. M. 15, 27 Pac. 312.

122 Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. 313; Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541; Springville v. Fullmer, 7 Utah, 450, 27 Pac. 577.

123 See ante, § 42.

ority, so long as the rights of other persons are not injuriously affected by such change.[124] So, also, he may change his waterway by the use of new ditches, abandoning the old, without his rights being in any way affected thereby.[125] But the right of the appropriator to change his point of diversion is subject to the condition that the rights of others shall not be in any way impaired by the change, and such change will not be permitted if it would injuriously affect the rights of other appropriators or landowners.[126] The quantity of water to which the appropriator is entitled will be neither increased nor diminished by a change of the point of diversion.[127]

§ 47. Application of Water to Beneficial Use—Water must be Used Within a Reasonable Time.

The last step necessary to effect an appropriation of water, and by which the appropriator's right is perfected, is the actual application of the water to the use designed. There must not only be an actual diversion, made with the intent to apply the water to beneficial use, but the water must be actually applied to such use within a reasonable time.[128] "Ac-

[124] Ware v. Walker, 70 Cal. 591, 12 Pac. 475; Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. 313; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. 472; Offield v. Ish (Wash., 1899) 57 Pac. 809. See statutes in Appendix.

[125] Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278. See ante, § 42.

[126] McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18; Cole v. Logan, 24 Ore. 304, 33 Pac. 568; Hague v. Nephi Irr. Co., 16 Utah, 421, 52 Pac. 765.

[127] Smith v. Corbit, 116 Cal. 587, 48 Pac. 725.

[128] California: Peregoy v. McKissick, 79 Cal. 572, 21 Pac. 967.

Colorado: Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Wheeler v.

ual use for a beneficial purpose is the true and only final test touching the question whether a party's claim has ripened into a valid appropriation. There can be no constructive appropriation, nor can any step required to be taken throughout the whole project and course of water appropriations be constructively accomplished. It is the actual physical performance of every essential requisite, from the time the purpose is definitely conceived, down to the ultimate use of the water, in connection with the advancement of some useful and beneficial industry, that matures and finally accomplishes the appropriation.[129]

What constitutes a reasonable time within which the water must be applied to beneficial use is obviously a question of fact depending upon the circumstances of each particular case.[130]

Northern Colo. Irr. Co. 10 Colo. 582, 17 Pac. 487; Platte Water Co. v. Northern Colo. Irr. Co. 12 Colo. 525, 21 Pac. 711; Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028; Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966; Ft. Morgan Land & Canal Co. v. South Platte Ditch Co. 18 Colo. 1, 30 Pac. 1032; Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 Pac. 444; Cache La Poudre Reservoir Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 Pac. 331; Colorado Land & Water Co. v. Rocky Ford Canal, etc., Co., 3 Colo. App. 545, 34 Pac. 580; Beaver Brook Reservoir & Canal Co. v. St. Vrain Reservoir & Fish Co., 6 Colo. App. 130, 40 Pac. 1066; Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. 153.

Montana: Power v. Switzer, 21 Mont. 523, 55 Pac. 32.

New Mexico: Millheiser v. Long, (N. M., 1900) 61 Pac. 111.

Oregon: Hindman v. Rizor, 21 Ore. 112, 27 Pac. 13; Cole v. Logan, 24 Ore. 304, 33 Pac. 568; Low v. Rizor, 25 Ore. 551, 37 Pac. 82; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. 472.

Utah: Hague v. Nephi Irr. Co., 16 Utah, 421, 52 Pac. 765.

Washington: Offield v. Ish (Wash., 1899) 57 Pac. 809.

129 Wolverton, J., in Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. 472.

130 Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Beaver Brook Reser-

An appropriator does not lose his right to the water diverted by a delay in applying the water to beneficial use, where such delay is due to accident,—as by the breaking of his ditch before the application of the water.[131]

§ 48. Same—Gradual Application Through Successive Seasons.

Where an appropriator claims a certain quantity of water which he may legally appropriate for the irrigation of his land, it is not necessary, in order for him to bring himself within the rule stated in the preceding section, that he should apply all the water covered by his appropriation to beneficial use during the first year after his appropriation. If he does not need, or is not in a position to use, all the water during the first season, he may apply it gradually to his land through successive seasons, increasing the quantity used year after year, as he adds to the area of his cultivated ground, until he has used all the water necessary to properly irrigate his whole tract; provided, of course, this does not exceed the quantity contemplated by his original appropriation.[132] This does not mean, however, that, because a prior appropriator is entitled to a given quantity of water necessary to irrigate the land he intends to cultivate, he can suspend his improvements for an unreasonable length of time, and then, by adding to the area of his cultivated land, be restored to his orig-

voir & Canal Co. v. St. Vrain Reservoir & Fish Co., 6 Colo. App. 130, 40 Pac. 1066; Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. 153; Hindman v. Rizor, 21 Ore. 112, 27 Pac. 13; Low v. Rizor, 25 Ore. 551, 37 Pac. 82.

131 Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. 128.

132 Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Conant v. Jones (Idaho, 1893) 32 Pac. 250; Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. 5; Barnes v. Sabron, 10 Nev. 217; Simmons v. Winters,

inal intended diversion when subsequent appropriators have acquired rights in the stream. The fact that he, for an unreasonable time, delays additional cultivation, will be construed into an abandonment of his original claim to divert a sufficient quantity to irrigate his whole tract, and his appropriation, after such unreasonable delay, will be confined to the quantity of water necessary to irrigate the land he has cultivated within a reasonable time before any subsequent rights had accrued. That is to say, the right to increase the amount of water used may be lost by unreasonable delay in exercising the right.[133] Only reasonable diligence, however, is required. As long as the appropriator does not abandon, but continues, in good faith, the application of the water to his land as rapidly as his means and circumstances will permit, he will be held to be within the limit of a reasonable time.[134]

To illustrate these principles: It has been held that the

21 Ore. 35, 27 Pac. 7; Cole v. Logan, 24 Ore. 304, 33 Pac. 568; Low v. Rizor, 25 Ore. 551, 37 Pac. 82.

133 Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. 399; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Hindman v. Rizor, 21 Ore. 112, 27 Pac. 13; Cole v. Logan, 24 Ore. 304, 33 Pac. 568; Low v. Rizor, 25 Ore. 551, 37 Pac. 82.

One who appropriates water for the irrigation of his lands, and uses a portion of the water for that purpose, but fails within a reasonable time to add to the area under cultivation, so as to use the water to the extent of his original appropriation, will be held to have abandoned his original claim to divert a sufficient quantity to irrigate his entire tract, and, as against subsequent appropriators, is entitled to only a sufficient amount of water to irrigate the land in cultivation. Cole v. Logan, 24 Ore. 304, 33 Pac. 568; Low v. Rizor, 25 Ore. 551, 37 Pac. 82.

134 Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. 153; Arnold v. Passavant, 19 Mont. 575, 49 Pac. 400; Moss v. Rose, 27 Ore. 595, 41 Pac. 666.

fact that an appropriator, who had 180 acres of land capable of being irrigated from his ditches, for ten years cultivated only 45 acres, was not sufficient, in view of the circumstances, to show lack of diligence in applying the water to use.[135] So, also, a delay of seven years has been held not unreasonable.[136] On the other hand, a delay of fourteen[137] or twenty[138] years has been held unreasonable.

It should be noticed that the fact that the acreage irrigated under a ditch has been increased does not necessarily show that the amount of water used has been increased, for greater economy in use, less thorough saturation of the soil, or difference in soil as to its absorbing quality, may account for the use of the same quantity of water over a greater area.[139]

The right to apply gradually the water claimed does not include the right to increase the extent of the original appropriation; that is to say, an appropriator who claims a certain quantity of water for the irrigation of a particular tract of land, although he may not be required to bring all of such land under cultivation at once, cannot, as against subsequent appropriators, increase the amount of his appropriation by applying water to other land, not contemplated in the original appropriation.[140]

§ 49. Same—Methods of Applying Water.

The methods of applying water to the soil vary with the

135 Arnold v. Passavant, 19 Mont. 575, 49 Pac. 400.
136 Moss v. Rose, 27 Ore. 595, 41 Pac. 666.
137 Hindman v. Rizor, 21 Ore. 112, 27 Pac. 13.
138 Low v. Rizor, 25 Ore. 551, 37 Pac. 82.
139 Cache La Poudre Irr. Co. v. Larimer & Weld Reservoir Co., 25 Colo. 144, 53 Pac. 318.
140 See post, § 59.

character of the soil and crop, the quantity of water available, the slope of the ground, and like considerations. The water may be distributed, as is usually done in the case of hay crops, such as alfalfa, growing on nearly level ground, by cutting the side of the distributing ditch constructed along the highest parts of the field, either by making temporary openings with a shovel or hoe, or by permanent gates, and letting the water flow in all directions over the surface. This is evidently the simplest mode of distribution from a ditch. Other methods, varying in complexity up to elaborate systems of distribution by means of pipes, are employed.[141] These are matters of interest to the practical irrigator, rather than to the lawyer.

The true test of appropriation of water, in its legal aspect, is the successful application of the water to the beneficial use designed; the method of diverting or carrying it, or of making the application being wholly immaterial. It is not even necessary that ditches be used. Thus, if a dam or other contrivance will suffice to turn the water from the stream, and moisten the lands sought to be cultivated, this is sufficient, although no ditch be needed or constructed.[142] Moreover, it seems that if land be rendered productive by the natural overflow of the water thereon, without the aid of any appliances whatever, the cultivation of the land by means of the water so naturally moistening it constitutes a valid appropriation of such water, or of so much thereof as is reasonably necessary for such use.[143]

141 See Census Report on Agriculture by Irrigation, 1890, p. 20.
142 Thomas v. Guiraud, 6 Colo. 530.
143 Opinion of Helm, J., in Thomas v. Guiraud, 6 Colo. 530. See, also, ante, § 1.

§ 50. Same—Place of Use.

In our examination of the doctrine of riparian rights, we found that the riparian proprietor may use the water of a stream for irrigation only on riparian lands. In this respect there is a wide difference between the right of the appropriator and that of the riparian owner. The right to water acquired by priority of appropriation is not in any way dependent on the locus of its application to the beneficial use designed.[144] The water may be used either in the valley of the stream from which it is taken, or it may be carried over an intervening ridge to land lying in the valley of another stream, and there used.[145] The water may be diverted to the exclusion of a riparian owner, as will be necessary where the lands to be irrigated therewith are not located on the banks, or in the neighborhood of the stream.[146]

Not only is it immaterial where the appropriator uses the water in the first instance, but he may afterwards change the place of use without losing his right to the water, provided the rights of other persons are not injuriously affected by such change.[147] But he cannot make such change so as to deprive subsequent appropriators of their rights.[148]

Where an appropriator, by reason of a mistake in the location of the boundaries of his land, uses a portion of the

[144] Coffin v. Left Hand Ditch Co., 6 Colo. 443; Offield v. Ish (Wash., 1899) 57 Pac. 809.

[145] Hammond v. Rose, 11 Colo. 524, 19 Pac. 466; Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854; Coffin v. Left Hand Ditch Co., 6 Colo. 443; Thomas v. Guiraud, 6 Colo. 530.

[146] Hammond v. Rose, 11 Colo. 524, 19 Pac. 466.

[147] Davis v. Gale, 32 Cal. 27; Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41; Knowles v. Clear Creek P. R. Mill & Ditch Co., 18 Colo. 209, 32 Pac. 279.

[148] Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959.

water diverted by him on land not belonging to him, he does not, by such mistake, lose his right to this portion of the water, and one who subsequently acquires title to the land on which it was used has no right thereto.[149]

§ 51. The Doctrine of Relation.

The rights of an appropriator of water do not become absolute until the appropriation is completed by the actual application of the water to the use designed; but where he has pursued the work of appropriation with due diligence, and brought it to completion within a reasonable time, as against other appropriators, his rights will relate back to the time of the commencement of the work.[150] By the terms of the statutes requiring the posting of a notice of appropriation, the rights thus acquired relate back to the time of posting the notice.[151] And inasmuch as the principle underlying the decisions on the subject is that the right of the appropriator shall, in a proper case, relate back to the time when the first step was taken to secure it, it seems that such right will relate back to the time of posting a notice, where this is required by local custom, although there is no statutory provision on the subject.[152] One who seeks to avail himself of the doc-

149 Mahoney v. Neiswanger (Idaho, 1899) 59 Pac. 561.

150 Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571; Seiber v. Frink, 7 Colo. 148, 2 Pac. 901; Water Supply & Storage Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. 496; Colorado Land & Water Co. v. Rocky Ford Canal, etc., Co., 3 Colo. App. 545, 34 Pac. 580; Ophir Silver Min. Co. v. Carpenter, 4 Nev. 544; Irwin v. Strait, 18 Nev. 436, 4 Pac. 1215; Keeney v. Carillo, 2 N. M. 480; Cole v. Logan, 24 Ore. 304, 33 Pac. 568; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. 472.

151 Consult statutes in Appendix. Murray v. Tingley, 20 Mont. 260, 50 Pac. 723.

152 See Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. 472.

trine of relation back under the statutory provisions as to notice can do so only by a strict compliance with the statutory requirements.[153]

VI. The Right Acquired by Appropriation.

§ 52. The Doctrine of Priority.

Having discussed the several steps by which a water right may be acquired by appropriation, we will now consider the nature and extent of the right so acquired. In this connection we will first examine the doctrine of priority.

It is the fundamental principle of the doctrine of appropriation that, among several appropriators of water, he whose appropriation is first in time acquires, as against subsequent appropriators, a better right to the water appropriated to the extent of such appropriation; or, in other words, priority of appropriation confers superiority of right to the water appropriated. With one or two exceptions, it is expressly so provided by the constitutions or statutes of all the arid states,[154] and in these states, as well as in those in which there is no express provision on the subject, this doctrine of priority has been repeatedly upheld by the courts.[155]

153 Murray v. Tingley, 20 Mont. 260, 50 Pac. 723; Umatilla Irr. Co. v. Umatilla Imp. Co., 22 Ore. 366, 30 Pac. 30.

154 Consult statutes, etc., in Appendix.

155 United States: Basey v. Gallagher, 20 Wall. (U. S.) 670.

California: Stein Canal Co. v. Kern Island Irr. Canal Co., 53 Cal. 563; Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571; Hines v. Johnson, 61 Cal. 259; Brown v. Mullin, 65 Cal. 89, 3 Pac. 99.

Colorado: Schilling v. Rominger, 4 Colo. 100; Coffin v. Left Hand Ditch Co., 6 Colo. 443; Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Rominger v. Squires, 9 Colo. 327, 12 Pac. 213; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep.

As has been seen in a previous section, the doctrine of appropriation, and so the doctrine of priority, although recognized and confirmed by constitutional provisions, or by statutes, state and federal, existed prior to and independently of these provisions, and had its origin in the absolute necessity for irrigation in the arid region. The right to water by priority of appropriation, and the duty of the state and national government to protect such right, existed prior to any legislation on the subject.[156]

§ 53. Priority between Appropriators Using Water for Different Purposes.

We have already seen that the uses to which water may be put have been sometimes classified as ordinary or natural, and extraordinary or artificial, the use for irrigation being usually considered an extraordinary or artificial use.[157] This classification has not been employed except in connection with

604; Hammond v. Rose, 11 Colo. 524, 19 Pac. 466, 7 Am. St. Rep. 258; Burnham v. Freeman, 11 Colo. 601, 19 Pac. 761; Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028; Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. 313; Bloom v. West, 3 Colo. App. 212, 32 Pac. 846.

Idaho: Hillman v. Hardwick, 2 Idaho, 983, 28 Pac. 438; Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541; Kirk v. Bartholomew, 2 Idaho, 1087, 29 Pac. 40; Geertson v. Barrack, 2 Idaho, 1066, 29 Pac. 42; Dunniway v. Lawson (Idaho, 1898) 51 Pac. 1032.

Nevada: Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Barnes v. Sabron, 10 Nev. 217; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497; Jones v. Adams, 19 Nev. 78, 6 Pac. 442.

New Mexico: Keeney v. Carillo, 2 N. M. 480; Millheiser v. Long (N. M., 1900) 61 Pac. 111.

Oregon: Kaler v. Campbell, 13 Ore. 596, 11 Pac. 301.

156 See ante, § 23. Coffin v. Left Hand Ditch Co. 6 Colo. 442; Thomas v. Guiraud, 6 Colo. 530.

157 Ante, § 3.

the doctrine of riparian rights. The statutes authorizing the acquisition of water rights by appropriation declare in general terms that the right to the use of water may be acquired by appropriation, and that the appropriator who is first in time is first in right. Under these statutes, the rights of the appropriator depend solely upon the time of his appropriation, and, with the exception presently to be noticed, no superiority of right can be claimed on the ground that the water in question is to be used for one purpose, rather than another.

In Colorado and Idaho, by the state constitutions, the priority rule as above stated is made to apply as between those using the water for the same purpose; but, in case of deficiency, those desiring to use the water for domestic purposes are given the preference over those claiming it for any other purpose, while agricultural uses are preferred to the use of the water for manufacturing purposes.[158] It has been several times held in Colorado that this provision is prospective in its operation, and does not apply to water rights acquired prior to the adoption of the constitution in 1876.[159] The domestic use protected by the constitution, as defined by the Colorado supreme court, is such use as the riparian owner has at common law to take water for himself, his family, or his stock, and the like; and the right to use the water for such purpose must be exercised in connection with the riparian ownership. By recognizing a preference in those using the water for domestic purposes over those using it for any other purpose, it is not intended to authorize a di-

158 Const. Colo. art. 16, § 6; Const. Idaho, art. 15, § 3; Schwab v. Beam, 86 Fed. 41.

159 Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. 313;

version of water for domestic use from the public streams of the state by means of pipe lines or canals.[160] Nor can such right to preference be conveyed separately from the land of the riparian owner.[161]

In this connection, it may be proper to note a recent decision in the United States circuit court for the district of Colorado, in which it was held that nothing in the constitution of that state, or in the law relating to irrigation, in any way modifies or changes the rules of the common law in respect to the diversion of streams for manufacturing, mining or mechanical purposes. In Colorado, as elsewhere in the United States, the law is now, as it has been at all times, that, for such purposes, each riparian owner may use the waters of running streams on his own premises, allowing such waters to go down to subsequent owners in their natural channel.[162]

§ 54. Quantity of Water That may be Claimed—General Principles.

Where there is but one appropriator from a stream, or where the stream is large enough to easily supply the needs of all who may wish to use the water, the quantity of water taken by each appropriator is a matter of small consequence; but where the stream is small, or the number of appropriators large, so that the water supply may become insufficient for

Colorado Milling & Elevator Co. v. Larimer & Weld Irr. Co. (Colo. Sup., 1899) 56 Pac. 185; Armstrong v. Larimer County Ditch Co., 1 Colo. App. 49, 27 Pac. 235.

160 Montrose Canal Co. v. Loutsenhizer Ditch Co., 23 Colo. 233, 48 Pac. 532; Broadmoor Dairy & Live Stock Co. v. Brookside Water & Imp. Co., 24 Colo. 541, 52 Pac. 792.

161 Broadmoor Dairy & Live Stock Co. v. Brookside Water & Imp. Co., supra.

162 Schwab v. Beam, 86 Fed. 41.

all, it becomes of prime importance that each appropriator should receive all the water to which he is entitled, and that he should receive no more than this quantity. Just how much this may be in a particular case may be sometimes difficult to determine, on account of conflict of testimony as to matters of fact, but the controlling principles are extremely simple. Briefly stated, the law is this: Each appropriator is entitled to all the water not already appropriated by others, and subject to appropriation, which he has actually diverted from the stream, and has applied or will apply to beneficial use within a reasonable time, and no more. The extent of his right is measured by the extent of his lawful appropriation. More specifically, a prior appropriator is entitled to a sufficient quantity of water, up to the extent of his appropriation, to irrigate all his lands for the benefit of which the appropriation was made.[163] He cannot claim more than he has actually appropriated, that is to say, more than he has actually diverted, or has provided means to divert, with a present intention to divert and use,[164] nor more than he actually needs for the irrigation of his lands, and is or may be used for that purpose.[165] But he may divert from the stream

[163] Hillman v. Hardwick, 2 Idaho, 983, 28 Pac. 438; Roeder v. Stein, 23 Nev. 92, 42 Pac. 867; Cole v. Logan, 24 Ore. 304, 33 Pac. 568; Bowman v. Bowman (Ore., 1899) 57 Pac. 546.

[164] Greer v. Heiser, 16 Colo. 306, 26 Pac. 770; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278; Low v. Schaffer, 24 Ore. 239, 33 Pac. 678; Salina Creek Irr. Co. v. Salina Stock Co., 7 Utah, 456, 27 Pac. 578; Becker v. Marble Creek Irr. Co., 15 Utah, 225, 49 Pac. 892, 1119.

[165] Arizona: Clough v. Wing (Ariz., 1888) 17 Pac. 453.

California: Barrows v. Fox, 98 Cal. 63, 32 Pac. 811; Riverside Water Co. v. Sargent, 112 Cal. 230, 44 Pac. 560; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139. See Riverside Land & Irr. Co. v. Jansen, 66 Cal. 300, 5 Pac. 486.

Colorado: Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278; New

water enough to yield, at the place of use, the quantity required, after the loss by absorption and evaporation of so much thereof as is necessarily so lost, in a ditch or flume well constructed, and kept in good condition.[166] Conversely, it seems that he cannot claim more than this quantity, as against other persons who may desire to use the water, although, by reason of the insufficiency of his means of diversion and conveyance of the water, he would actually receive, at the place of use, only a quantity sufficient for the irrigation of his land. His right is limited to the quantity of water necessary for the proper irrigation of his land, when diverted and conveyed to the place of use by reasonably economical means, properly constructed, and kept in repair.[167]

§ 55. Same—How Far Determined by Capacity of Ditch.

The right of a prior appropriator is measured, as already stated, by his necessity, and not by the capacity of the ditch or the quantity of water diverted, where the ditch carries

Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989; Colorado Milling & Elevator Co. v. Larimer & Weld Irr. Co. (Colo. Sup., 1899) 56 Pac. 185; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. 395.

Nevada: Barnes v. Sabron, 10 Nev. 217; Simpson v. Williams, 18 Nev. 432, 4 Pac. 1213; Roeder v. Stein, 23 Nev. 92, 42 Pac. 867.

New Mexico: Millheiser v. Long (N. M., 1900) 61 Pac. 111.

Oregon: Simmons v. Winters, 21 Ore. 35, 27 Pac. 7; Hindman v. Rizor, 21 Ore. 112, 27 Pac. 13; Bowman v. Bowman (Ore., 1899) 57 Pac. 546.

Utah: Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. 867; Becker v. Marble Creek Irr. Co., 15 Utah, 225, 49 Pac. 892, 1119; Hague v. Nephi Irr. Co., 16 Utah, 421, 52 Pac. 765; Manning v. Fife, 17 Utah, 232, 54 Pac. 111.

166 Natoma Water & Min. Co. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334, citing Barrows v. Fox, 98 Cal. 63, 32 Pac. 811.

167 See cases cited in note immediately preceding.

more water than the needs of the appropriator require.[168] The capacity of the ditch has no bearing on the question except in so far as the maximum quantity of water which the appropriator may claim is necessarily limited to the quantity actually diverted, which, of course, depends upon the carrying capacity of the ditch, and, as this can never be greater than its capacity at its smallest point, the irrigator can acquire the right to no more water than will flow through his ditch at its point of least capacity.[169]

§ 56. Same—Water must be Used in a Reasonable Manner.

The rule that a prior appropriator is entitled to a quantity of water sufficient for the irrigation of his land does not mean that he may use the water for this purpose wastefully, or without any regard to the needs of other landowners. He is bound to use the water in a reasonable manner, and is entitled, as against other persons, to only so much water as may be reasonably necessary for his purposes.[170] It is his duty

168 Bowman v. Bowman (Ore., 1899) 57 Pac. 546. See, also, Millheiser v. Long (N. M., 1900) 61 Pac. 111.

169 Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139. In Barnes v. Sabron, 10 Nev. 217, the court said: "If the capacity of his [the plaintiff's] ditches is greater than is necessary to irrigate his farming land, he must be restricted to the quantity needed for the purposes of irrigation, for watering his stock, and for domestic purposes. If, however, the capacity of his ditches is not more than sufficient for those purposes, then, under all the facts of this case, no change having been made in either of plaintiff's ditches since they were constructed, and no question of the right of enlargement being involved, he must be restricted to the capacity of his ditches at their smallest point,—that is, at the point where the least water can be carried through them." See, also, Dougherty v. Haggin, 61 Cal. 305; Carron v. Wood, 10 Mont. 500, 26 Pac. 388; and the mining cases, Caruthers v. Pemberton, 1 Mont. 111; Ophir Silver Min. Co. v. Carpenter, 6 Nev. 393.

170 Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 45

to use the water with due regard to the needs of other persons, and, where the water is scarce, he should employ proper means to convey it in an economical manner to the place of application, to use it only at such times and in such quantities as may be necessary, and, when other persons require the water, to stop its flow at such times as it may not be needed for his own use.[171] What constitutes a reasonable use will depend upon the circumstances of each particular case, such as the size of the stream, the number of consumers, the character of the soil, the nature of the crops planted, and other like considerations.[172]

§ 57. Same—Appropriation of Entire Flow of Stream.

We have seen that the rights of an appropriator depend solely upon the fact of prior appropriation, and that an irrigator may use all the water, not already appropriated by others, that may be reasonably necessary for the irrigation of his land. Except as against prior appropriators, the rights of an appropriator, unlike those depending upon the fact of riparian ownership, are measured solely by his own needs and actual appropriation, and he is not concerned with the effect of the satisfaction of his own wants on other persons. It follows from these principles, that a prior appropriator may use the entire flow of a stream for irrigation, provided

Pac. 160; Barnes v. Sabron, 10 Nev. 217; Jones v. Adams, 19 Nev. 78, 6 Pac. 442; Roeder v. Stein, 23 Nev. 92, 42 Pac. 867; Low v. Schaffer, 24 Ore. 239, 33 Pac. 678.

171 Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254.

172 Heilbron v. 76 Land & Water Co., 80 Cal. 189, 22 Pac. 62; Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 45 Pac. 160; Barnes v. Sabron, 10 Nev. 217; Low v. Schaffer, 24 Ore. 239, 33 Pac. 678.

this is necessary for the proper irrigation of his land.[173]

Where the doctrine of riparian rights obtains, it is held that one who has made an appropriation on the public domain does not, by becoming a riparian owner, lose his right to make a further appropriation of the water of the stream, and he may, by subsequent appropriation, take all the water of the stream if, at the time of such increased appropriation, there are no other riparian owners or prior appropriators, and persons who subsequently become riparian owners acquire no rights in the water as against him.[174] An appropriator who has acquired the right to all of the water of a stream in its ordinary flow is not entitled to surplus water flowing in the stream during times of extraordinary high water or freshets, and cannot restrain the diversion of such surplus by another.[175]

§ 58. Same—Surplus Water.

As already stated, the right of a prior appropriator to the water of a stream is measured by the extent of his appropriation,—that is, by the quantity of water actually diverted and used or needed by him. So long as he is able to secure the full amount of water which he may lawfully claim, he cannot complain that other persons, located higher up the stream, are diverting water therefrom,[176] even though

[173] Healy v. Woodruff, 97 Cal. 464, 32 Pac. 528; Hammond v. Rose, 11 Colo. 524, 19 Pac. 466; Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541; Mahoney v. Neiswanger (Idaho, 1899) 59 Pac. 561; Roeder v. Stein, 23 Nev. 92, 42 Pac. 867; Low v. Schaffer, 24 Ore. 239, 33 Pac. 678; Offield v. Ish (Wash., 1899) 57 Pac. 809.

[174] Healy v. Woodruff, 97 Cal. 464, 32 Pac. 528.

[175] Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704.

[176] Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. 335.

the effect of such diversion may be to deprive him of some of the water to which he is entitled, where this result may be avoided by his perfecting his own means of diversion, so as to avoid unnecessary waste.[177] In the water not covered by his own appropriation he has no interest whatever. The surplus remaining above his appropriation is subject to appropriation by others, and where he has diverted more water than he is entitled to, the prior appropriator will not be permitted to waste it, or dispose of it to others, but must return such surplus to the stream for the benefit of subsequent appropriators.[178] Thus, a prior appropriator of the water of a stream, after subsequent appropriations have been made, cannot, after his own wants have been satisfied, sell the surplus water to a stranger, so as to deprive the subsequent appropriators of the use thereof.[179] Nor can he give such surplus to one of the later appropriators, so as to confer upon him superior rights thereto, as against the other appropriators.[180] When returned to its natural channel, such surplus water becomes, as before, a part of the waters of the natural stream, and inures to the benefit of other appropriators in the order of their appropriations.[181] The rights of a subsequent appropriator are, of course, limited to the water not already appropriated, and he cannot, by appropriating the surplus returned to the stream by a

177 Natoma Water & Min. Co. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334.

178 Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 Pac. 459; Simmons v. Winters, 21 Ore. 35, 27 Pac. 7; Manning v. Fife, 17 Utah, 232, 54 Pac. 111.

179 Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 Pac. 459.

180 Manning v. Fife, 17 Utah, 232, 54 Pac. 111.

181 Water Supply & Storage Co. v. Larimer & Weld Reservoir Co., 25 Colo. 87, 53 Pac. 386.

prior appropriator, acquire any right to the water originally appropriated by the latter.[182]

§ 59. Same—Enlargement or Extention of Use.

In the preceding sections, we have considered the extent of the appropriator's right, as secured by his original appropriation. We will now inquire as to his right to subsequently enlarge or extend the use contemplated, so as to consume a greater quantity of water. The law on this subject is well settled. The rights of an appropriator of water are fixed by the extent of his original appropriation for a beneficial use. Water not covered by his appropriation may be appropriated by others, whose rights will depend for priority upon the order of their respective appropriations. Each appropriator, with respect to his particular appropriation, has a prior and exclusive right, as against all other appropriators of other water from the same stream, whether their appropriations were made before or after his own. From these principles it follows that an appropriator whose rights are thus fixed by his appropriation cannot afterwards enlarge or extend his use of the water, so as to interfere with the vested rights of other appropriators.[183] Thus, where prior appropriators of water permitted a portion of it to run to waste, without putting it to a beneficial use, and others appropriated such surplus, and used it for the irriga-

182 Brown v. Mullin, 65 Cal. 89, 3 Pac. 99.

183 Union Mill & Mining Co. v. Dangberg, 81 Fed. 73; Cache La Poudre Reservoir Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 Pac. 331; Colorado Milling & Elevator Co. v. Larimer & Weld Irr. Co. (Colo. Sup. 1899) 56 Pac. 185; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. 395; Becker v. Marble Creek Irr. Co., 15 Utah, 225, 49 Pac. 892, 1119.

tion of their lands, it was held that the earlier appropriators could not, by increasing their acreage, interfere with the rights of the subsequent appropriators, acquired before such increased use.[184] So, also, an irrigation company, which has acquired a right to a certain quantity of water for irrigation, cannot afterwards divert an additional quantity of water for storage, so as to deprive other appropriators of the water appropriated by them after the company's first appropriation, but before the diversion for storage.[185] Of course, one who has appropriated a certain quantity of water from a stream may afterwards make a new appropriation, from the same stream, of any water not in the meantime appropriated by others, but his right to such additional water will depend wholly upon the validity of the new appropriation, and will date therefrom; such appropriation being entirely independent of any former appropriation by him from the same stream.[186]

It should be noted that the statements made in this section apply only to an enlargement of the use as originally contemplated. As we have already seen, an appropriator who claims a certain amount of water may, in some cases, use a portion of it the first year, and increase the quantity used from year to year, until he has applied to beneficial use all the water covered by his original appropriation.[187] This is not such an enlargement of use as is contemplated in the present section.

184 Becker v. Marble Creek Irr. Co., 15 Utah, 225, 49 Pac. 892, 1119.

185 Colorado Milling & Elevator Co. v. Larimer & Weld Irr. Co. (Colo. Sup., 1899) 56 Pac. 185.

186 Healy v. Woodruff, 97 Cal. 464, 32 Pac. 528.

187 See ante, § 48.

§ 60. Right to Flow of Tributaries.

Where an irrigator, by prior appropriation, has acquired the right to the flow of a stream, or to a certain quantity of the water, it follows necessarily that his appropriation is, in effect, an appropriation also of all the tributaries and other sources of supply of the stream, so far as this may be necessary to insure to him the quantity of water covered by his appropriation. Hence, other appropriators or persons will not be permitted to so divert or control the water of tributary streams as to cut off the sources of supply, and prevent the prior appropriator from receiving the full amount of water to which he is entitled.[188] Thus, the owner of land on which a spring rises may be restrained from diverting the water therefrom, to the prejudice of a prior appropriator from a stream naturally fed by such spring.[189] It will be presumed that water flowing in a natural channel, which reaches the banks of a stream, and there disappears in the sands of the bed, augments the flow in the main stream by percolation, until the contrary is shown; and the burden of proof is on the party diverting such water to establish that it does not mingle with the main waters of the stream.[190]

188 Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. 313; Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 Pac. 444; Bruening v. Dorr, 23 Colo. 195, 47 Pac. 290; Platte Val. Irr. Co. v. Buckers Irr., Mill. & Imp. Co., 25 Colo. 77, 53 Pac. 334; Water Supply & Storage Co. v. Larimer & Weld Reservoir Co., 25 Colo. 87, 53 Pac. 386; Malad Val. Irr. Co. v. Campbell, 2 Idaho, 378, 18 Pac. 52; Strait v. Brown, 16 Nev. 317; Low v. Schaffer, 24 Ore. 239, 33 Pac. 678; Low v. Rizor, 25 Ore. 551, 37 Pac. 82.

189 Bruening v. Dorr, 23 Colo. 195, 47 Pac. 290.

190 Platte Val. Irr. Co. v. Buckers Irr., Mill. & Imp. Co., 25 Colo. 77, 53 Pac. 334.

The application of the general rule is not limited to the ordinary sources of supply, such as springs and tributary streams. Thus, where an appropriator had acquired the right to the flow of a stream having its source in a lake, it was held that other persons had no right, by tapping the lake by irrigating ditches, so to lower its level as to deprive the prior appropriator of some of the water which he had appropriated.[191]

Ordinarily, an appropriator will, in the nature of things, have no interest in the water of the main stream, or of its tributaries, below his point of diversion, but the rule is otherwise where he is liable to be called upon for contribution to supply the wants of other appropriators lower down. In such case, he is accordingly entitled to the flow of lower tributaries, as against junior appropriators thereof, when this is necessary to protect him against the claims of lower prior appropriators from the main stream. This question was recently raised in the supreme court of Colorado, and it was held that a prior appropriator of the water of a stream might require a junior appropriator from a lower tributary to surrender the use of the water, before he himself should be required to do so, in favor of lower appropriations from the main stream, senior to both.[192] In such case, the lower senior appropriators are not necessary parties in an action to determine which of the upper appropriators shall first surrender his use, as this is a question in which they have no concern.[193]

191 Baxter v. Gilbert (Cal., 1899) 58 Pac. 129.

192 Platte Val. Irr. Co. v. Buckers Irr., Mill. & Imp. Co., 25 Colo. 77, 53 Pac. 334; Water Supply & Storage Co. v. Larimer & Weld Reservoir Co., 25 Colo. 87, 53 Pac. 386.

193 Water Supply & Storage Co. v. Larimer & Weld Reservoir Co., 25 Colo. 87, 53 Pac. 386.

The rule giving a prior appropriator the right to the flow of tributary streams will not be extended further than is necessary to protect him in his rights, and he cannot complain of the diversion of the water of tributaries unless his rights are thereby invaded. Thus, the diversion of the water of a tributary will not be restained at the suit of a lower appropriator from the main stream, unless such diversion diminishes the quantity of water which would otherwise reach the main stream by a natural channel, and shortens the period of the natural flow, and then it will be restrained only as to such quantity and period.[194] The prior appropriator has no ground of action so long as he receives all the water to which he is entitled.[195]

§ 61. Use of Water by Periods.

As we have already seen, a prior appropriator of water acquires an absolute right thereto only to the extent to which such water is applied to a beneficial use. His right to the water depends upon user, and can exist or continue only at or during such times as the water is used or needed for a beneficial purpose. If, therefore, the prior appropriator makes use of the water only at certain times, as during certain seasons, or on certain days in the week, or during a certain number of days in a month, other persons may acquire a right to the use of the water at other times, or on other days.[196] So, also, where several persons appropriate water

[194] Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. 883.

[195] Creighton v. Kaweah Canal & Irr. Co., 67 Cal. 221, 7 Pac. 658; Salina Creek Irr. Co. v. Salina Stock Co., 7 Utah, 456, 27 Pac. 578.

[196] Santa Paula Water Works v. Peralta, 113 Cal. 38, 45 Pac. 168, following Smith v. O'Hara, 43 Cal. 371; Barnes v. Sabron, 10 Nev.

as tenants in common, they may agree among themselves that each shall have the use of the water at certain times.[197]

217; Stowell v. Johnson, 7 Utah, 215, 26 Pac. 290. See, also, Cache La Poudre Reservoir Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 Pac. 331; Salina Creek Irr. Co. v. Salina Stock Co., 7 Utah, 456, 27 Pac. 578.

197 Lytle Creek Water Co. v. Perdew, 65 Cal. 447, 4 Pac. 426. See Santa Paula Water Works v. Peralta, 113 Cal. 38, 45 Pac. 168.

CHAPTER IV.

RIGHT OF WAY FOR DITCHES AND CANALS.

§ 62. Generally—Condemnation of Right of Way.
63. Condemnation of Right of Way—Right of Condemnation Limited.
64. Same—Enlargement of Ditch Already Constructed.
65. Same—Assessment of Damages.
66. Right of Way over Public Lands.
67. Right of Entry for Construction and Maintenance of Ditch.

§ 62. Generally—Condemnation of Right of Way.

The right to appropriate water for irrigation purposes would be of little value, except to the owners of land lying adjacent to the stream from which the water is to be taken, unless accompanied with authority to secure a right of way over the lands of others for the construction of ditches or other works for the conveyance of the water to the place of intended use. A right of way over private lands may, of course, be obtained by arrangement with the owner, in which case the extent of such right, the amount of compensation to be paid therefor, the conditions of the grant, etc., will depend upon the terms of the contract between the parties.[1] So, also, a right of way may be acquired by prescription.[2]

[1] A right of way may be acquired by implied grant. Thus, where a ditch is constructed across one of two adjoining tracts of land, owned by the same person, for the purpose of irrigating the other, and the owner subsequently conveys the two tracts to different persons, the two grantees take their respective tracts, one subject to, and the other entitled to, such easement. Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69.

[2] Where the owner of land has conducted water for the irrigation

But the possibility of securing the all-important right of way for irrigating ditches could not safely be left to depend upon the acquiescence of the landowner, or his willingness to grant such right, either in no event, or upon whatever terms he might see fit to impose. And it is provided in the several arid states by constitution or statute, or both, that a right of way across private as well as public lands may be secured for irrigation purposes by condemnation, upon the payment of just compensation.[3]

In some of the states, as in Colorado, the right of condemnation may be exercised, although the use of water for irrigation be a private use.[4] The exercise of the power of condemnation is justified in Colorado on the ground of necessity; and all lands in the state are declared to be held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands, and this servitude arises, not by grant, but by operation of law.[5] In other states, the statutes authorizing the exercise of the right of condemnation

thereof over the land of another for more than ten years, with the acquiescence of the owner of the servient estate, he acquires an easement therein by prescription, although the original grant of such easement may have been by parol. Coventon v. Seufert, 23 Ore. 548, 32 Pac. 508. See, also, Miller v. Douglas (Ariz., 1900) 60 Pac. 722. An irrevocable right to an easement for a water ditch cannot be acquired by a mere permissive use, not amounting to adverse user. Yeager v. Woodruff, 17 Utah, 361, 53 Pac. 1045.

[3] See statutes in Appendix.

[4] See Const. Colo. art. 2, § 14.

[5] Yunker v. Nichols, 1 Colo. 551. See, also, opinion of Thatcher, C. J., in Schilling v. Rominger, 4 Colo. 100.

The statute granting a right of way for irrigating ditches over the land of others, now in force in Colorado (Mills' Ann. St. § 2257), was passed by the first legislative assembly of the then territory in

have been held constitutional, on the ground that the use contemplated is a public use.[6]

It is to be noted that, where a statute confers a right of way for an irrigating ditch over the land of another, a person cannot, by the mere force of the statute, go upon such land without the owner's consent, and construct a ditch. Be-

1861. In Yunker v. Nichols, 1 Colo. 551, Wells, J., in a concurring opinion, said: "It appears to me that this right must rest altogether upon the necessity, rather than upon the grant which the statute assumes to make, * * * and existed before the statute was enacted, and would still survive, though the statute were repealed." This case was decided before the adoption of the constitution in 1876.

[6] Ouray v. Goodwin (Ariz., 1891) 26 Pac. 376; Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757; Paxton & Hershey Irr. Canal & Land Co. v. Farmers' & Merchants' Irr. & Land Co., 45 Neb. 884, 64 N. W. 343. See, also, as to condemnation by irrigation companies, post, § 127.

Where, in a proceeding to condemn a strip of defendant's land for a canal, the complaint alleged that "the uses for which said water is intended and designed are mining, irrigation, manufacturing, and household and domestic purposes; that the line of said canal has been surveyed and located upon the ground, and marked out, etc.; * * * that along said line of canal there are many valuable mining claims, and a large body of undeveloped mining land, besides much agricultural land; that said mining claims cannot be worked, nor can said mineral land be developed, nor can said agricultural land be profitably cultivated, without water brought upon the same by artificial means; that said canal is intended to and will supply this want by the sale and distribution of the said water along its line, and at its terminus at Thompson's Flat, and such is the design and intention of the plaintiff; and he avers that it is a public use, and that he is in charge thereof; * * * that the taking of a portion of said land of the defendant for said use is necessary," etc.,—this was held to be a sufficient averment of a public use to bring the case within the provisions of Code Civ. Proc. Cal. § 1238, and Const. Cal. art. 14, § 1. Cummings v. Peters, 56 Cal. 593.

fore such right may be exercised, it must be first definitely ascertained by a proper proceeding in eminent domain.[7] The manner of exercising the right of condemnation is regulated in the several states by statute.[8] Thus, in Colorado, the act on the subject of eminent domain prescribes a complete system of procedure for the taking or damaging of private property, and determining the compensation therefor when such taking or damaging is authorized by law. Proceedings under the act are special proceedings, and differ in many respects from ordinary civil actions under the Code. The provisions of the Code are therefore inapplicable to such proceedings.[9] In Colorado, the county court has concurrent jurisdiction with the district court to entertain condemnation proceedings to secure a right of way where the amount of damages and the value of the land taken are within the money limit placed upon its jurisdiction.[10]

§ 63. Condemnation of Right of Way—Right of Condemnation Limited.

While the irrigator is given the absolute right of way over the lands of others for the construction of his irrigating ditches, etc., it is proper that this privilege should be exer-

7 Emerson v. Eldorado Ditch Co., 18 Mont. 247, 44 Pac. 969; Toyaho Creek Irr. Co. v. Hutchins (Tex. Civ. App., 1899) 52 S. W. 101.

8 Consult the statutes of the several states on the subject of eminent domain. The right of a purely private party to condemn a right of way for a ditch to convey water to his lands for domestic, agricultural, and mining purposes is guarantied by the constitution of Colorado, and the manner of exercising the right is regulated by statute. Downing v. More, 12 Colo. 316, 20 Pac. 766.

9 Tripp v. Overocker, 7 Colo. 72, 1 Pac. 695; Knoth v. Barclay, 8 Colo. 300, 6 Pac. 924.

10 Southwestern Land Co. v. Hickory Jackson Ditch Co., 18 Colo.

cised with a due regard to the rights of the owners of the land thus burdened. In Colorado a statute has been passed limiting the right of condemnation for the protection of the landowner. By this statute it is provided that no tract or parcel of improved or occupied land in the state shall, without the written consent of the owner, be burdened with two or more irrigating ditches for the conveyance of water to other lands, where all the water necessary to be conveyed through such property can be conveyed in a single ditch.[11] This act does not conflict with the constitutional provisions granting a right of way for the construction of ditches, but, while recognizing the privilege, simply undertakes to regulate the exercise thereof, so as to inflict the least possible inconvenience and injury upon the owner of the servient estate.[12] It has been held by the Colorado court of appeals that the provisions of this act are intended for the protection of private landowners, and cannot be invoked by an irrigation company in a proceeding by a rival company to condemn a right of way across the land of the former.[13] Provisions similar to the Colorado act are found in the statutes of Oregon[14] and Nebraska relating to ditch companies. The Nebraska statute, which provides that "no tract of land shall be crossed by more than one ditch," etc., is somewhat more general in its terms than that of Colorado, and is held

489, 33 Pac. 275; Otero Canal Co. v. Fosdick, 20 Colo. 522, 39 Pac. 332; Sievers v. Garfield County Court, 11 Colo. App. 147, 52 Pac. 634.

11 Mills' Ann. St. § 2261.

12 Tripp v. Overocker, 7 Colo. 72, 1 Pac. 695.

13 San Luis Land, Canal & Imp. Co. v. Kenilworth Canal Co., 3 Colo. App. 244, 32 Pac. 860.

14 Laws Ore. 1891, p. 56, §§ 12, 13.

to include the property of corporations, as well as of natural persons.[15] Another provision for the protection of the landowner is that the ditch shall be constructed over the shortest

15 Paxton & Hershey Irr. Canal & Land Co. v. Farmers' & Merchants' Irr. & Land Co., 45 Neb. 884, 64 N. W. 343. This case, in the supreme court of Nebraska, was an appeal from a decree of the Lincoln county district court, dismissing the action of the plaintiff company, whereby it sought to prevent the appropriation by the defendant company of a right of way through its lands for an irrigating canal, under the provisions of the Rayner irrigation law of 1889. The plaintiff contended that it was within the exception contained in section 3, art. 1, of the act, as follows: "No tract of land shall be crossed by more than one ditch, canal, or lateral without the written consent and agreement of the owner thereof, if the first ditch, canal, or lateral can be made to answer the purpose for which the second is desired or intended." The district court decreed that this section was not applicable to the facts in the case, for the reason that the defendant's contemplated ditch was not being constructed for the purpose of irrigating the lands crossed by the plaintiff's ditch, nor the lands lying under it, but for the irrigation of lands lying beyond and below it, and that the defendant was entitled to cross the plaintiff's lands for the purpose of constructing its ditch, on complying with the requirements of law for that purpose. The supreme court affirmed this decree. Post, J., after referring to the Colorado decision above cited, said: "We are, however, unable to accept that case as an authoritative interpretation of our statute. The term, 'no tract of land,' as employed without qualifications, must be held to include the property of corporations, as well as natural persons, and such would have been the construction had the statute read, 'the land of no person shall be crossed,' etc. [citing authorities]. But we reach the same conclusion as the district court,—presumably by the same course of reasoning. * * * Referring again to the proviso involved, we are first impressed with the fact that the primary object thereof is the protection of landowners, rather than the proprietors of irrigating ditches. True, both characters may, as in this instance, be united in one person or corporation, but such cases are exceptions, and apparently not within the contemplation of the legislature. It is, in the second place, noticeable that the act is silent respecting

and most direct route practicable upon which such ditch can be constructed with uniform grade, and discharge the water at a point whence it can be conveyed to the place of use.[16]

§ 64. Same—Enlargement of Ditch Already Constructed.

The Colorado statute contains a further provision, by which effect is given to the provisions considered in the preceding section, which prohibits a person who has constructed a private ditch to convey water through the lands of another from prohibiting or preventing other persons from enlarging or using such ditch in common with him.[17] This section applies only to ditches constructed through the lands of others, to convey water to other lands, and not to ditches constructed by a landowner on his own land for the irrigation of such land exclusively.[18] The ditches subject to enlargement and joint use under this section are strictly private ditches, and such as are used to convey water across the

the terms and conditions upon which one irrigating company may make use of the canal or ditch of another. Nor is the proprietor of such a ditch required to supply water upon any terms to a rival corporation. We are, after a careful analysis of the language of the exception, unable to say that it contemplates the connecting of different canals, or that it imposes upon one irrigating company any duty to supply water to the patrons of another. What the statute implies is that no tract of land shall, without the consent of the owner, be burdened with two or more ditches for the watering of the same territory."

16 Mills' Ann. St. § 2262; Downing v. More, 12 Colo. 316, 20 Pac. 766.

17 Mills' Ann. St. § 2263. See, also, Laws Ore. 1891, p. 56, § 13. As to proceedings under the Colorado statute, see Sand Creek Lateral Irr. Co. v. Davis, 17 Colo. 326, 29 Pac. 742.

18 Downing v. More, 12 Colo. 316, 20 Pac. 766, modifying Tripp v. Overocker, 7 Colo. 72, 1 Pac. 695.

land of another to irrigate the adjoining land of the person or corporation owning the ditch. A city cannot, by virtue of this section, acquire the right to enlarge and use, for the purpose of supplying its citizens with water, a ditch used for the carriage of water for hire to the public generally.[19] But the mere fact that the ditch is owned by an incorporated company does not exempt it from the operation of the statute, where such ditch is used for private, and not for public, purposes.[20]

The using or enlarging of the ditch of another without his consent is as much a taking or damaging of private property, within the meaning of the constitution, as would be appropriating a right of way therefor in the first instance, and the owner of such ditch is entitled to just compensation, to be determined in the manner required by law. And the section under consideration, though otherwise constitutional, has been held unconstitutional, in that, by providing for such enlargement or use upon the payment to the ditch owner of a reasonable proportion of the cost of construction of the ditch, it limits or directs the compensation to be paid for the property, instead of leaving this to be determined as provided by the state constitution. The rest of the act, however, stands as a valid statute, when taken in connection with other statutes and the constitutional provisions upon the same subject.[21]

The enlargement or improvement of a ditch under this

19 Junction Creek & N. D. D. & I. Ditch Co. v. City of Durango, 21 Colo. 194, 40 Pac. 356.

20 Sand Creek Lateral Irr. Co. v. Davis, 17 Colo. 326, 29 Pac. 742.

21 Tripp v. Overocker, 7 Colo. 72, 1 Pac. 695. As to compensation, see Sand Creek Lateral Irr. Co. v. Davis, 17 Colo. 326, 29 Pac. 742.

statute must be made at the expense of the person desiring it. The owner of the ditch cannot be required to perform work or make expenditures for the purpose of adapting his ditch to the use of another.[22] Where a ditch is enlarged and extended by others than the original owners, the cost of repairs upon the new ditch from the terminus of the old is not chargeable upon the original proprietors of the old, but the keeping of the headgate and the ditch to its original terminus in repair is the duty of both sets of owners, the expense to be adjusted upon an equitable basis.[23]

It is to be noted that a person does not, by acquiring a right of way for a ditch across the land of another, acquire the right to subsequently enlarge such ditch, and if he so enlarges it without the consent of the landowner, he will be liable to the latter in damages.[24]

§ 65. Same—Assessment of Damages.

The mode of ascertaining the amount of compensation to be paid for property taken or injured for the construction of irrigating ditches, etc., is prescribed by the various statutes and constitutional provisions covering the law of eminent domain. And where the state constitution provides that the compensation for taking or damaging private property against the owner's consent must be ascertained in a particular manner, as by a jury or board of commissioners, this requirement is imperative, and the legislature is powerless to dispense with it.[25]

22 Sand Creek Lateral Irr. Co. v. Davis, 17 Colo. 326, 29 Pac. 742.

23 Patterson v. Brown & Campion Ditch Co., 3 Colo. App. 511, 34 Pac. 769.

24 Clear Creek Land & Ditch Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. 819. As to enlargement by contract with the ditch owner, see Chicosa Irr. Ditch Co. v. El Moro Ditch Co., 10 Colo. App. 276, 50 Pac. 731.

25 Tripp v. Overocker, 7 Colo. 72, 1 Pac. 695.

All damages, present and prospective, that are the natural, necessary, or reasonable incident of the improvement, must be assessed in the condemnation proceedings, not including, however, such as may arise from the negligent or unskilful construction or use thereof. And where damages have been assessed, and payment made and accepted, there can be no subsequent recovery for an injury which should have been, but was not, considered in computing the damages. Thus, an injury to land resulting from seepage and leakage from a canal or reservoir ought to be anticipated, and damages therefor included in the original assessment, and no damages for such injury can be recovered in a subsequent action, except so far as the injury results from negligence or unskilfulness.[26]

§ 66. Right of Way over Public Lands.

The act of congress of 1866 and the amendatory act of 1870 acknowledge and confirm a right of way for the construction of ditches and canals in favor of persons who, by priority of possession, have acquired vested rights to the use of water on the public domain, and, by the terms of the statute, all persons who acquire title to the land from the government after the construction of ditches or reservoirs used in connection with such water rights take the same subject to the burden of such easements. This statute constitutes a grant of a right of way over the public land for the purposes specified.[27] By the act of March 3, 1891, a right

[26] Denver City Irr. & Water Co. v. Middaugh, 12 Colo. 434, 21 Pac. 565.

[27] Rev. St. U. S. §§ 2339, 2340; Jennison v. Kirk, 98 U. S. 453; Broder v. Water Co., 101 U. S. 274; Tynon v. Despain, 22 Colo. 240, 43 Pac. 1039; Nippel v. Forker (Colo. Sup., 1899) 56 Pac. 577, affirm-

of way through the public lands and reservations is granted to ditch companies and others for ditches and reservoirs, subject to certain conditions, upon compliance with certain requirements as to the filing of proofs of organization of the company, map of canal, and so forth.[28] This act applies only to vacant and unoccupied land, and no rights can be claimed under it in respect to land to which private rights have previously attached.[29] A right of way or easement over public land under the acts of 1866 and 1870 can be claimed only for such ditches and reservoirs as are used in connection with vested and accrued water rights, and a person cannot claim an easement over public land for a ditch or reservoir under these acts unless he has first acquired a vested and accrued water right, in connection with which such ditch or reservoir is to be used.[30]

By the act of 1870, patents granted, or pre-emptions or homesteads allowed, are declared to be subject to rights to ditches and reservoirs used in connection with water rights acquired under the act of 1866. The act of 1866 contains a proviso that whenever any person or persons shall, in the construction of any ditch or canal, injure or damage the pos-

ing 9 Colo. App. 106, 47 Pac. 766. See, also, Bybee v. Oregon C. R. Co., 139 U. S. 663. A ditch constructed on unoccupied public land is held by grant, and the owner does not forfeit his right thereto by mere nonuser. Ada County Farmers' Irr. Co. v. Farmers' Canal Co. (Idaho, 1898) 51 Pac. 990. One may construct an irrigating ditch on unoccupied public land, and is not liable to a subsequent settler thereon for damages for digging the ditch. Shoemaker v. Hatch, 13 Nev. 261. See, also, Miller v. Douglas (Ariz., 1900) 60 Pac. 722.

28 26 Stat. p. 1101, §§ 18121. For text of this act, see Appendix.

29 Nippel v. Forker (Colo. Sup., 1899) 56 Pac. 577, affirming 9 Colo. App. 106, 47 Pac. 766.

30 Nippel v. Forker (Colo. Sup., 1899) 56 Pac. 577.

session of any settler on the public domain, the party committing such injury or damage shall be liable therefor to the party injured.[31] It is held that this proviso does not grant rights of way where none existed before, nor confer additional rights upon owners of ditches subsequently constructed. An appropriator cannot, as against a subsequent homestead settler, enter upon land in the possession of the latter, for the purpose of changing his point of diversion, or shifting the line of his ditch, and constructing new waterways, without the settler's consent.[32] A person in possession of public land, who has made improvements thereon, but has taken no steps to secure title to the land, is not entitled to compensation for any of the land taken or injured by the construction of an irrigating ditch by another, but the most he can claim is compensation for injury or damage to his improvements, caused by the construction of the ditch.[33] A right of way for an irrigating ditch on the public domain vests only upon the completion of the work, and a compliance, on the part of the ditch owner, with the local laws, customs, etc., although such right attaches as fast as the ditch is constructed.[34]

§ 67. Right of Entry for Construction and Maintenance of Ditch.

The right of way across the land of another for an irrigating ditch will necessarily include the right to enter upon

31 Rev. St. U. S. §§ 2339, 2340. See Jennison v. Kirk, 98 U. S. 453.

32 McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060.

33 Knoth v. Barclay, 8 Colo. 300, 6 Pac. 924. See, also, Farmers' High Line Canal & Reservoir Co. v. Moon, 22 Colo. 560, 45 Pac. 437.

34 Jarvis v. State Bank of Ft. Morgan, 22 Colo. 309, 45 Pac. 505.

the premises for the purpose of constructing the ditch or keeping it in repair. This will be the case, however the right of way is acquired,—whether by condemnation, grant, prescription, or otherwise. Thus, in California, it is held that the right to take water from or across the land of another for use on the premises of the person taking it is an easement founded on a grant, or on a prescription which presupposes a grant. Such an easement does not give its owner the right to commit a trespass upon the servient tenement, nor may he exercise it in any manner which happens to suit his pleasure. His right is measured by the terms of his grant, or, where the supposed original grant does not appear, by the prescriptive use. His right includes, however, secondary easements, such as the right to enter upon the servient tenement, and make repairs to his ditch, and to do such other things as may be necessary to the full exercise of his right. But these secondary easements must be exercised only when necessary, and in such a reasonable manner as not to increase needlessly the burden upon the servient tenement.[35]

If a landowner permits an appropriator of water to enter his inclosure for the purpose of changing his point of diversion, and to construct and keep up a dam for diverting water for a number of years, he will be estopped by such acquiescence from thereafter treating the appropriator as a trespasser, and denying his right of entry.[36]

One who appropriates water from a stream on the public domain acquires, as against a subsequent purchaser from the United States of the land above him on the stream, as

[35] Joseph v. Ager, 108 Cal. 517, 41 Pac. 422. See, also, Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18.

[36] Miller v. Douglas (Ariz., 1900) 60 Pac. 722.

complete and perfect a right to maintain his ditch, and have the water flow to, in, and through the same, as though such right or easement had vested in him by grant, and such right carries with it implied authority to do all that is necessary to secure the enjoyment of such easement. Thus, where the stream has become obstructed, so as to prevent the water from flowing to his ditch, the appropriator has a right, as against such subsequent purchaser, to enter upon the land of the latter, and remove the obstructions from the bed of the stream, so as to permit the water to continue to flow in its original channel to the head of his ditch.[37]

A prior appropriator of water, who constructs a dam across the bed of a stream for the purpose of raising its surface to a level which will cause it to flow to the head of his ditch, does not thereby acquire such an exclusive right in the bed and banks of the stream, as far as the slack water extends above his dam, that he can enjoin a subsequent appropriator of the surplus water from tapping the stream and diverting such surplus at any point above the dam, and below the head of the slack water, provided he does not thereby interfere with the rights of the prior appropriator.[38]

[37] Ware v. Walker, 70 Cal. 591, 12 Pac. 475. In Crisman v. Heiderer, 5 Colo. 589, it was held that the owner of a water right (in this case for milling purposes) had a right to enter the bed of the stream above his ditch, and to remove obstructions preventing the water from reaching his ditch, and, as an appropriator, had implied authority to do all that should become necessary to secure the benefit of his appropriation, and might acquire an easement in the adjoining lands, but that the right so acquired must be held to the narrowest limits compatible with the enjoyment of the principal easement, that is, the right to the use of the water.

[38] Natoma Water & Min. Co. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334.

CHAPTER V.

LIABILITY FOR DAMAGES CAUSED BY CONSTRUCTION AND USE OF DITCHES.

§ 68. General Rules as to Liability of Ditch Owner for Damages.
69. Liability of Irrigation Companies Owning Ditches.
70. The Doctrine of Contributory Negligence.
71. Bridging Ditches Crossing Highways and Streets.

§ 68. General Rules as to Liability of Ditch Owner for Damages.

The maintenance and use of an irrigating ditch may sometimes occasion injury to neighboring landowners, and it is therefore important to inquire how far the irrigator is liable in such case. The injury here contemplated is injury resulting from the use of the ditch as a conduit for water, and not such injury as would properly be considered in estimating damages in condemnation proceedings to secure a right of way.

We observe, first, that no recovery can be had for damages incident to the construction, existence and maintenance of an irrigating ditch, within the scope of the lawful authority under which such ditch was constructed and is maintained, or, in other words, where a ditch exists by lawful authority, its owner is not liable for damages resulting from its mere existence.[1] Thus, an irrigating ditch in a city street is not necessarily a nuisance.[2] But one who constructs or maintains an irrigating ditch is bound to exercise rea-

[1] City of Denver v. Mullen, 7 Colo. 345, 3 Pac. 693; Platte & D. Ditch Co. v. Anderson, 8 Colo. 131, 6 Pac. 515; Walley v. Platte & D. Co., 15 Colo. 579, 26 Pac. 129; Bliss v. Grayson (Nev., 1899) 56 Pac. 231.

[2] City of Denver v. Mullen, 7 Colo. 345, 3 Pac. 693; Platte & D.

sonable care to prevent injury to other persons from such ditch, and he will be liable for all damages resulting to others from his negligence or unskilfulness in the construction, whether in planning or in actual construction, or in the maintenance or use of the ditch.[3] Thus, the owner of an irrigating ditch is bound to keep it in good repair, and is liable for all damages caused by his failure to do so.[4] So, also, he is bound to take proper precautions in the construction of his ditch to prevent water therefrom from flowing

Ditch Co. v. Anderson, 8 Colo. 131, 6 Pac. 515. Where an irrigation company constructed a canal through land subsequently included in a city, and maintained such canal some years before and after the incorporation of the city, whose officials recognized the existence of the canal, and received taxes thereon, and extensive works had been erected on account of the canal, and it appeared that the canal could be sunk below the surface of the street, and covered up, so as not to be an obstruction thereto, it was held, in an action by the city to enjoin the maintenance of the canal, and to abate it as a nuisance, that a decree ordering it to be filled was error. Fresno v. Fresno Canal & Irr. Co., 98 Cal. 179, 32 Pac. 943.

3 Chidester v. Consolidated Ditch Co., 59 Cal. 197; Greeley Irr. Co. v. House, 14 Colo. 549, 24 Pac. 329; Old v. Keener, 22 Colo. 6, 43 Pac. 127; Catlin Land & Canal Co. v. Best, 2 Colo. App. 481, 31 Pac. 391; Consol. Home Supply Ditch & Reservoir Co. v. Hamlin, 6 Colo. App. 341, 40 Pac. 582; Arave v. Idaho Canal Co. (Idaho, 1896) 46 Pac. 1024; Kearney Canal & Water Supply Co. v. Akeyson, 45 Neb. 635, 63 N. W. 921; Shields v. Orr Extension Ditch Co., 23 Nev. 349, 47 Pac. 194; Clear Creek Land & Ditch Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. 819. See, also, Richardson v. Kier, 34 Cal. 63, 37 Cal. 263, in which the ditch involved was not an irrigating ditch. A person irrigating his land is subject to the maxim "sic utere tuo ut alienum non laedas," and he will be responsible for injuries caused to others by his negligence or unskilfulness, or those willfully inflicted in the exercise of his right of irrigating his land. But an action cannot be maintained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to others. Gibson v. Puchta, 33 Cal. 310.

4 Catlin Land & Canal Co. v. Best, 2 Colo. App. 481, 31 Pac. 391;

over the land of another, to his injury. Thus, where a land owner permitted water from his irrigating ditch to percolate to and injuriously saturate the land of his neighbor, when he could easily have prevented such injury by proper drains, it was held that he was liable for the injury so caused, and that its continuance might be enjoined.[5]

In an action against a ditch owner to recover damages for injuries caused by the negligence of the defendant in maintaining the ditch, the burden is on the plaintiff to show that such injury was caused by the defendant's negligence, and also the amount of such damage or the value of the property destroyed by such negligence. The question of negligence is for the jury.[6]

§ 69. Liability of Irrigation Companies Owning Ditches.

The principles stated in the preceding section apply equally, whether the irrigating ditch is owned by an individual or by a company. The law requires canal companies to use reasonable skill, judgment, and care in the construction and maintenance of their ditches, and such companies will be liable for damages caused by their failure to perform their duty in this respect.[7] Thus, a ditch company

Kearney Canal & Water Supply Co. v. Akeyson, 45 Neb. 635, 63 N. W. 921; Shields v. Orr Extension Ditch Co., 23 Nev. 349, 47 Pac. 194; Thomas v. Blaisdell (Nev., 1899) 58 Pac. 903. The grantee of an easement for an irrigating ditch is bound to keep the ditch in repair. Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39.

5 Parker v. Larsen, 86 Cal. 236, 24 Pac. 989. See, also, Boynton v. Longley, 19 Nev. 69, 6 Pac. 437.

6 Greeley Irr. Co. v. House, 14 Colo. 549, 24 Pac. 329.

7 Jenkins v. Hooper Irr. Co., 13 Utah, 100, 44 Pac. 829; Lisonbee v. Monroe Irr. Co., 18 Utah, 343, 54 Pac. 1009. See, also, Weiderkind v. Tuolumne County Water Co., 65 Cal. 431, 4 Pac. 415. An

is bound to conduct its surplus water, in suitable ditches, back to its natural channel, when practicable, and to control and dispose of such water so that it will not injure the property of others, and will be liable for damages caused by its failure to do so.[8] A ditch company cannot gain a prescriptive right to be negligent, nor can it excuse its negligence in the management of its ditch by showing that other companies manage their ditches in the same manner.[9]

A ditch company is not an insurer against all damages from its ditch, without regard to the question of negligence, but is liable only when negligent.[10] Such companies are required to anticipate and prepare to meet only such emergencies as may reasonably be expected to arise in the course of nature. Thus, they are not required to prepare for storms of such unusual violence as to surprise cautious and reasonable men.[11] But where a ditch company is grossly negligent in attempting to carry water beyond the capacity of its ditch, it cannot escape liability for damages caused by a washout, on the ground that such damage was the result of unavoidable accident, as by the burrowing of gophers in the banks of the canal.[12] Nor can a ditch

irrigation company is bound to so construct its works as not to trespass upon the rights of adjacent landowners, and its agents or servants committing such wrong are also personally liable. Bates v. Van Pelt, 1 Tex. Civ. App. 185, 20 S. W. 949. A city is liable for injuries caused by its negligence in the use of an irrigating ditch controlled by it. Levy v. Salt Lake City, 5 Utah, 302, 16 Pac. 598.

8 Lisonbee v. Monroe Irr. Co., 18 Utah, 343, 54 Pac. 1009.

9 Jenkins v. Hooper Irr. Co., 13 Utah, 100, 44 Pac. 829.

10 King v. Miles City Irr. Ditch Co., 16 Mont. 463, 41 Pac. 431.

11 Lisonbee v. Monroe Irr. Ditch Co., 18 Utah, 343, 54 Pac. 1009.

12 Greeley Irr. Co. v. House, 14 Colo. 549, 24 Pac. 329. See, also, Chidester v. Consolidated Ditch Co., 59 Cal. 197.

company, by a contract releasing it from liability for damages caused by unavoidable accidents, exempt itself from liability for damage resulting from its gross and continued negligence.[13] In an action against a ditch company, formed by the consolidation of two pre-existing companies, to recover for damage caused by a ditch constructed by one of such companies, the plaintiff is required to prove by which company the ditch in question was constructed.[14]

In an action to abate an irrigation ditch owned by an irrigating company, the company is a necessary party, and although an officer of the company is personally liable for the tort in so placing the ditch as to injure adjacent property, it is error to order the filling of the ditch in an action against him for the tort, and to compel the filling of the ditch.[15]

§ 70. The Doctrine of Contributory Negligence.

As a general rule, it is the duty of the ditch owner to prevent injuries to other persons from his ditch, and not the duty of such other persons to protect themselves therefrom. It seems that where the injury occurs unexpectedly, or is transitory, the landowner should go to some trouble to avoid or lessen the damage, if this can be done by some temporary expedient, or at slight expense; but where the ditch owner, with full knowledge of the danger, negligently permits the injury to occur and continue, when he could have prevented it, he cannot escape liability on the ground that the landowner might, at slight expense, have prevented the

13 Catlin Land & Canal Co. v. Best, 2 Colo. App. 481, 31 Pac. 391.

14 Colorado Consolidated Land & Water Co. v. Morris, 1 Colo. App. 401, 29 Pac. 302.

15 Bates v. Van Pelt, 1 Tex. Civ. App. 185, 20 S. W. 949.

damage. In such case, no duty rests upon the latter to avoid the consequences of the ditch owner's negligence, and the doctrine of contributory negligence does not apply.[16]

§ 71. Bridging Ditches Crossing Highways and Streets.

In several states, the owners of ditches crossing public highways are required by statute to keep such highways open and safe for travel by the construction of proper bridges over their ditches. Such a provision does not require a ditch owner to cover a ditch running parallel with a highway, but becomes applicable only where the ditch crosses the highway, or so encroaches upon it as to interfere with travel.[17] And it has been held that a municipal corporation, which accepts the dedication of streets across which a ditch has been previously located and a right of way acquired, takes the same subject to the prior rights of the owners of the ditch, and that the duty to construct bridges, whenever and wherever the public necessity and convenience may require, and to keep the same in repair, devolves upon the city, and not upon the ditch owners.[18]

16 McCarty v. Boise City Canal Co., 2 Idaho, 225, 10 Pac. 623; Shields v. Orr Extension Ditch Co., 23 Nev. 349, 47 Pac. 194.

17 Farmers' High Line Canal & Reservoir Co. v. Westlake, 23 Colo. 26, 46 Pac. 134.

18 City of Denver v. Mullen, 7 Colo. 345, 3 Pac. 693.

CHAPTER VI.

PROPERTY IN WATER RIGHTS AND DITCHES.

§ 72. General Doctrine as to Property in Water Rights.
73. Water Rights as Appurtenances to Land.
74. Property in Ditches and Canals.
75. Co-ownership of Ditches and Water Rights.
76. Taxation of Ditches and Water Rights.

§ 72. General Doctrine as to Property in Water Rights.

That water and water rights are of the greatest importance and value in regions where, without the use of water, the land itself would be unproductive and worthless, is at once apparent. It will be pertinent, therefore, to inquire how far water and the right to its use may be considered as property, and what is their nature, respectively, as property. As to property in water itself, we observe that in several of the arid states the water of all natural streams not already appropriated is declared by the state constitution to be the property of the public, subject to appropriation by private individuals.[1] Ordinarily, running water, so long as it continues to flow in its natural course, is not, and cannot be made, the subject of private ownership, except in so far as it is regarded as a part of the land by or through which the stream flows. There is no distinct and separate ownership in the corpus of the water itself.[2] Thus, it has been held in a California case that, although an appropriator of water

[1] See post, § 119.

[2] See Kidd v. Laird, 15 Cal. 161; Bear Lake & River Waterworks & Irr. Co. v. Ogden City, 8 Utah, 494, 33 Pac. 135.

by means of a ditch leading from a natural stream may be entitled to the undiminished flow of the stream, the water in the stream above his ditch is not his personal property, but a part of the realty, though it may be personal property after it has passed into the ditch; and hence the appropriator cannot maintain an action for the value of water as for personal property sold and delivered, against one who, without his consent, has diverted the stream above the head of his ditch. [3] As conceded in the case just stated, water which the appropriator has taken from its natural channel, and confined in his works, may be personal property. Thus, it has been held that water in the pipes of the distributing system of a city, used by the inhabitants for irrigation and other purposes, is personal property; the ownership in such case being in the water itself, and not merely in the right to its use.[4]

But although there is no specific private property in running water itself, it is well settled that the right to the use of water for irrigation, acquired by priority of appropriation, is property, and is subject to the usual incidents of property, and will be protected as such. [5] A water right is property, within the constitutional provision that private property shall not be taken or damaged for a public or private use without just compensation.[6] A person who has

[3] Parks Canal & Min. Co. v. Hoyt, 57 Cal. 44.

[4] Bear Lake & River Waterworks & Irr. Co. v. Ogden City, 8 Utah, 494, 33 Pac. 135.

[5] Union Colony v. Elliott, 5 Colo. 371; Ft. Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 Pac. 1032; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278; Cash v. Thornton, 3 Colo. App. 475, 34 Pac. 268; Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025.

[6] Armstrong v. Larimer County Ditch Co., 1 Colo. App. 49, 27 Pac. 235; Fisher v. Bountiful City (Utah, 1899) 59 Pac. 520.

acquired a right to the use of water for irrigation by appropriation can be deprived thereof only by his voluntary act, by forfeiture, or by operation of law. [7]

In its nature, a water right or an interest in a water right and ditch is real estate, [8] and a perpetual right to have a certain quantity of water flow through an irrigating ditch is a freehold estate.[9] So, also, the right of a riparian proprietor, as such, to the use of water flowing by his land, is "identified with the realty, and is a real and corporeal hereditament."[10] And the right of an irrigation company to have the water flow in the stream to the head of its ditch is an incorporeal hereditament appurtenant to the ditch, and is coextensive with the right to the ditch itself. [11]

§ 73. Water Rights as Appurtenances to Land.

It is sometimes important to determine when or whether water rights are appurtenances to the land in connection with which they are used, or were acquired. This is especially the case in connection with conveyances of water

7 Fisher v. Bountiful City (Utah, 1899) 59 Pac. 510. See, also, Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278.

8 Lower Kings River Water Ditch Co. v. Kings River & Fresno Canal Co., 60 Cal. 408; Hayes v. Fine, 91 Cal. 391, 27 Pac. 772; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. 1020; Child v. Whitman, 7 Colo. App. 117, 42 Pac. 601; Ada County Farmers' Irr. Co. v. Farmers' Canal Co. (Idaho, 1898) 51 Pac. 990; Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054. See, also, Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741.

9 Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. 144.

10 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

11 Lower Kings River Water Ditch Co. v. Kings River & Fresno Canal Co., 60 Cal. 408. This was an action to recover damages for the diversion of water from the plaintiff's ditch. The ditch was situated partly in Fresno and partly in Tulare county; the head of

rights; for, as will be seen later, a conveyance of land will ordinarily carry with the land all water rights appurtenant thereto.[12] In the discussion of water rights, the terms "appurtenant" and "appurtenances" appear in some instances to have been used loosely by the courts where their precise meaning was not directly involved in the question to be decided. It is important to observe that "appurtenant" does not mean "inseparable," but that water rights, although appurtenant to land, may nevertheless exist as entirely independent and distinct rights of property, and, as such, be conveyed apart from the land.[13] Owing to a failure to note this distinction, and considering also a water right as a corporeal thing, which could not, as such, be appurtenant to land, the court of appeals of Colorado, in a recent decision, held that water rights are not appurtenances.[14] This decision is believed to be the only authority for the proposition that an appropriator's water right is a corporeal thing, and the further proposition that it may not become appurtenant to land.[15] On these propositions, the court appears to have been plainly wrong, and its ruling was examined and disapproved by the supreme court of Wyoming in a

the ditch and the point of defendant's diversion and the plaintiff's place of business being in Fresno county. The action was brought in Tulare county. This was held proper, the court holding the law to be as stated in the text, and therefore the injury affected the ditch as a whole, and, since the ditch lay in both counties, the action might have been brought in either.

12 See post, § 78.

13 Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025.

14 Bloom v. West, 3 Colo. App. 212, 32 Pac. 846.

15 In Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854, the question whether water rights may become appurtenances was raised, but left undecided.

case in which the question of water rights as appurtenances was exhaustively discussed.[16] This case has since been followed by the supreme court of Colorado,[17] and it may now be regarded as settled law that a water right acquired by appropriation is appurtenant to the land upon which the water is used.[18] And the ditch or other conduit for the water is attached to the land either as appurtenant or incident thereto, and necessary to its beneficial enjoyment, and is therefore part and parcel of the realty.[19]

The fact that the land to which the water is conveyed by the appropriator is unsurveyed public land does not prevent the water from becoming appurtenant thereto, where the appropriator is not a trespasser on the land, but a rightful occupant.[20] But the use of water by a trespasser upon the land of another does not make such water appurtenant to the land upon which it is wrongfully used.[21] It does not follow from this, however, that the use of water upon land to which it is already appurtenant, by one who is a trespasser thereon, will give him such a right to the water as that he may thereafter divert it from the land, or, upon being ejected therefrom, convey to a stranger a legal title to the

16 Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025.

17 Gelwicks v. Todd, 24 Colo. 494, 52 Pac. 788. See, also, Arnett v. Linhart, 21 Colo. 188, 40 Pac. 355.

18 See cases cited in note to § 78, post. See, also, Fitzell v. Leaky, 72 Cal. 477, 14 Pac. 198. For extensive discussion of the question of water rights as appurtenances, see Smith v. Denniff (Mont., 1900) 60 Pac. 398.

19 Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025. See Fitzell v. Leaky, 72 Cal. 477, 14 Pac. 198.

20 Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587.

21 Smith v. Logan, 18 Nev. 149, 1 Pac. 678.

water or the use thereof.[22] The burden of proving that a water right and ditch are appurtenant to land rests upon the party asserting it.[23]

§ 74. Property in Ditches and Canals.

An irrigating ditch or canal is, of course, property, and will ordinarily constitute a part of the land across or through which it is constructed. It is to be noted that an irrigating ditch, as property, is entirely distinct from the right to conduct water through it. The ownership of the ditch and that of the water right may be, and often is, vested in the same person, but one may own a ditch without owning a water right, and vice versa.[24] A conspicuous instance of this occurs in the case of irrigation through the agency of irrigation companies, where the company owns the ditch, and the water rights usually belong to the private consumers.[25] Ditches and canals, being property existing as such independently of the water rights, may be conveyed separately from such rights, the conveyance being executed with the usual formalities required in the case of any sale of real estate.[26] Mechanics' liens for work and materials furnished in the construction or maintenance of irrigating ditches may be enforced according to the general laws governing the en-

22 Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217.

23 Smith v. Denniff (Mont., 1900) 60 Pac. 398.

24 Clifford v. Larrien (Ariz., 1886) 11 Pac. 397; McLear v. Hapgood, 85 Cal. 555, 24 Pac. 788; Stocker v. Kirtley (Idaho, 1900) 59 Pac. 891.

25 See post, c. 13, "Irrigation Companies."

26 The conveyance of irrigating ditches will be considered so far as necessary in connection with the conveyance of water rights. See post, §§ 77-80.

forcement of such liens.[27] The owner of an irrigating ditch, like the owner of any other property, may maintain an action for an injury to the ditch,[28] the measure of damages for the destruction of such ditch being the difference in the value of the land without and with the ditch.[29] In several states malicious injuries to irrigating ditches are, by statute, made punishable as misdemeanors.[30]

§ 75. Co-ownership of Ditches and Water Rights.

Several persons may together construct or own a dam, headgate or ditch, to be used for the diversion or conveyance of water, in which case they are, of course, tenants in common of the dam, headgate or ditch. But their common ownership of the means of diversion or conveyance does not necessarily involve a common right to the water diverted or conveyed, for, as we have seen, the ownership of the water right and that of the means of diversion or conveyance may be entirely distinct. Several appropriators, whose appropriations date from different times, may use the same ditch or headgate without losing their respective priorities. Such use, in the absence of an agreement to that effect, does not result in a merger of their rights, but the same irrigating ditch may have two or more priorities belonging to the same party, or to different parties.[31]

[27] See Atlantic Trust Co. v. Woodbridge Canal & Irr. Co., 79 Fed. 39, 501, 86 Fed. 975; Jarvis v. State Bank, 22 Colo. 309, 45 Pac. 505; Greer v. Cache Val. Canal Co. (Idaho, 1894) 38 Pac. 653; Nelson v. Clerf, 4 Wash. 405, 30 Pac. 716.

[28] Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119. One may own an irrigating ditch without owning a water right, and may protect it from injury. Stocker v. Kirtley (Idaho, 1900) 59 Pac. 891.

[29] Denver, T. & Ft. W. R. Co. v. Dotson, 20 Colo. 304, 38 Pac. 322.

[30] Consult statutes in Appendix.

[31] Rominger v. Squires, 9 Colo. 327, 12 Pac. 213; Farmers' High

Ordinarily, where two or more persons together construct an irrigation ditch, and appropriate water by means of such ditch, they become tenants in common of the ditch and water rights also; the respective quantities of water to which each is entitled being determined by the terms of the contract between the parties, and their mutual rights and obligations being determined by the general law of cotenancy.[32] In such case, the possession and use of the ditch and water by one of the tenants in common is that of his cotenants, and is presumed to be not adverse to, but in maintenance of their rights, and in accordance with his own right as a tenant in common.[33] Tenants in common of an irrigating ditch are equally bound to keep it in repair, and where, through the failure of one of them to repair the ditch, the land of the other is overflowed, the latter has no right to fill up the ditch.[34]

Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278; Patterson v. Brown & Campion Ditch Co., 3 Colo. App. 511, 34 Pac. 769. See, also, Fitzell v. Leaky, 72 Cal. 477, 14 Pac. 198.

32 Lytle Creek Water Co. v. Perdew, 65 Cal. 447, 4 Pac. 426; Santa Paula Water Works v. Peralta, 113 Cal. 38, 45 Pac. 168; Schilling v. Rominger, 4 Colo. 100; Tucker v. Jones, 8 Mont. 225, 19 Pac. 571; Moss v. Rose, 27 Ore. 595, 41 Pac. 666; Smith v. North Canyon Water Co., 16 Utah, 194, 52 Pac. 283.

33 Moss v. Rose, 27 Ore. 595, 41 Pac. 666; Smith v. North Canyon Water Co., 16 Utah, 194, 52 Pac. 283.

34 Moss v. Rose, 27 Ore. 595, 41 Pac. 666. In this case, the parties were tenants in common of a ditch across defendant's land, and through the plaintiffs' neglect to keep the ditch in repair, the defendant's land was overflowed, whereupon he filled the ditch, thus cutting off the water from the plaintiffs' land, for which injury he was held liable. The court held, further, that "the plaintiffs will be allowed to appropriate one-half of the waters diverted, and required to bear one-half of the expense of maintaining the

§ 76. Taxation of Ditches and Water Rights.

Ditches and water rights, being property, are, of course, taxable, in the absence of any constitutional or statutory provision exempting such property from taxation. In several of the states it is expressly provided that ditches, canals, etc., used for irrigation purposes, shall be exempt from taxation, or shall not be separately taxed.[35] Thus, in Colorado and Utah the constitution provides that "ditches, canals and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed, so long as they shall be owned and used exclusively for such purpose."[36] In the absence of this provision, all canals would be subject to separate taxation.[37] Under this provision, only those canals which are exclusively used for irrigating the lands owned by those who own the canals, either in whole or in part, are relieved from separate taxation. The ditches, canals, and flumes exempted are divisible into three general classes: (1) Those owned by one or more individuals, and exclusively used for irrigating the lands of said individuals, or the lands of any of them; (2) those owned by a corporation, and exclusively used for irri-

ditch across the defendant's lands, and, for the purpose of performing their part of the work, they must have the right of entry upon the said lands of defendant along the banks of the ditch. And, in case of the default of either party, the other may complete the necessary repairs, and thereupon the party in default shall be liable for one-half the expense thereof."

35 See constitutional and statutory provisions in Appendix.

36 Const. Colo. art. 10, § 3; Const. Utah, art. 13, § 3; Rev. St. Utah 1898, § 2503.

37 Empire Land & Canal Co. v. Board Com'rs Rio Grande County, 21 Colo. 244, 40 Pac. 449.

gating lands belonging to the corporation, and lands belonging to shareholders of the corporation, or lands of the corporation or the shareholders, or any thereof; and (3) those owned in part by a corporation and partly by individuals, and exclusively used for irrigating lands belonging to the corporation and to said individual owners, or the lands of the corporation or said individuals, or any thereof.[38] Although ditches, etc., coming within the scope of this provision, may not be separately returned for taxation, there seems to be no reason why they may not be indirectly taxed by giving to the land benefited by them a proportionately increased valuation.

A more sweeping provision is that found in Nebraska, exempting all ditches, etc., used for the purpose of irrigation, from all taxation, whether for state, county, or municipal purposes.[39] Under a statute exempting water rights from taxation "in all cases where the land or other property upon which the water pertaining to such rights is assessable for taxation," but providing that, in making the assessment, the assessor shall estimate the increased value of such land or other property caused by the use of such water, water in the pipes of a distributing system of a city for the use of its inhabitants is not exempt.[40]

38 Empire Land & Canal Co. v. Board Com'rs, Rio Grande County, 21 Colo. 244, 40 Pac. 449, reversing 1 Colo. App. 205, 28 Pac. 482.

39 Consol. St. Neb. 1891, § 2035.

40 Bear Lake & River Waterworks & Irr. Co. v. Ogden City, 8 Utah, 494, 33 Pac. 135, construing 2 Comp. Laws Utah 1888, § 2784.

CHAPTER VII.

TRANSFER OF WATER RIGHTS.

§ 77. Generally—Water Right may be Sold or Otherwise Transferred.
78. Conveyance of Water Right with Land.
79. Conveyance of Water Right Separate from Land.
80. Formalities of Conveyance.
81. Contracts and Licenses Affecting Water Rights.

§ 77. Generally—Water Right may be Sold or Otherwise Transferred.

Like other property, a water right may be sold or otherwise transferred. An appropriator of water for irrigation may sell the right to all or a portion of the water covered by his appropriation.[1] A sale by the appropriator of the right to use a portion of the water appropriated by him for the irrigation of his land does not indicate that he has appropriated more water than he actually needed.[2] It is not necessary that a purchaser of a water right from an appropriator should use the water for the purpose for which it was used by his vendor, but the purchase may be for an entirely different use. Thus, a city may purchase, for municipal purposes, a priority acquired for irrigation, and succeed to the rights of the original proprietor. This is in accordance with the general principle that the use to which water

[1] Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. 313; Ft. Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 Pac. 1032; Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054; Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025.

[2] Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541.

is put is immaterial, and a change in such use does not affect the right.[3]

A water right acquired by appropriation may be sold not only after it has been perfected, but also before the appropriation is complete, and while, therefore, the right is as yet unperfected; that is to say, the appropriator, while engaged in making his appropriation, may sell his rights so far acquired to another, although they are not yet perfected, and are liable to forfeiture in case he or his successor in interest fails to prosecute the work of appropriation to completion with reasonable diligence. And his vendee, by completing the appropriation with reasonable diligence, may perfect the water right for his own benefit. Thus, a canal company at any time, while prosecuting its work of construction with proper diligence, may sell and dispose of such rights as it may have, and the grantee may succeed to such rights and become the legal successor of the grantor; but, in order to become such, the grantee must succeed in the same right, and the prosecution must be substantially of the same enterprise. That is to say, it must succeed to the charter rights of the grantor, and prosecute the enterprise under the same franchise and in accordance with the statement and certificate of its organization.[4] Where the work of appropriation is begun and abandoned, all incipient rights ac-

[3] Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. 313. See, also, Springville v. Fullmer, 7 Utah, 450, 27 Pac. 577.

One who has appropriated no more water than is necessary for the irrigation of his land may sell a portion of such water to a railway company for supplying its station. Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541.

See ante, §§ 45, 53.

[4] Colorado Land & Water Co. v. Rocky Ford Canal, etc., Co., 3 Colo. App. 545, 34 Pac. 580.

quired are forfeited, and revert to the public, and cannot be thereafter sold or transferred.[5]

78. Conveyance of Water Right with Land.

In examining the question of the transfer of water rights, we will consider, first, the transfer of such rights along with the land in connection with which the rights exist, or the water is used. That a water right and the land in such case may be sold together would seem to be sufficiently obvious. Thus, the right of a riparian proprietor, as such, to the flow of a stream, being annexed to the soil, passes with it, not as an easement or appurtenance, but as part and parcel of it.[6] So, also, where a water right acquired by appropriation is regarded as an appurtenance to the land upon which the water is used, a conveyance of the land without any reference to the water right will pass such right also unless it be expressly reserved in the deed.[7] And a conveyance of a ditch by means of which water is appropriated will take with

[5] Colorado Land & Water Co. v. Rocky Ford Canal, etc., Co., 3 Colo. App. 545, 34 Pac. 580.

[6] Lux v. Haggin, 69 Cal. 255 10 Pac. 674; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. 762; Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147.

[7] California: Cave v. Crafts, 53 Cal. 135; Farmer v. Ukiah Water Co., 56 Cal. 11; Coonradt v. Hill, 79 Cal. 587, 21 Pac. 1099; Crooker v. Benton, 93 Cal. 365, 28 Pac. 953; Clyne v. Benicia Water Co., 100 Cal. 310, 34 Pac. 714; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725. See, also, Painter v. Pasadena Land & Water Co., 91 Cal. 74, 27 Pac. 539.

Montana: Tucker v. Jones, 8 Mont. 225, 19 Pac. 571; Sweetland v. Olsen, 11 Mont. 27, 27 Pac. 339; Smith v. Denniff (Mont., 1899) 57 Pac. 557, 60 Pac. 398.

Oregon: Simmons v. Winters, 21 Ore. 35, 27 Pac. 7; Coventon

it the water right as an appurtenance.[8] So, also, a reservation of an interest in a ditch is a reservation of a like interest in the water right annexed to the ditch.[9]

In Colorado it is held that since a water right is a distinct subject of grant, and transferable either with or without the land, the question whether a deed to land conveys the water right depends upon the intention of the grantor, which is to be gathered from the express terms of the deed; or when the deed is silent as to the water right, from the presumption that arises from the circumstances, and whether such right is or is not incident to and necessary to the beneficial enjoyment of the land.[10] Where the water right is expressly mentioned as a part of the subject of the grant, it will, of course, pass under the deed.[11] And although not mentioned in the deed, the water right will pass as an ap-

v. Seufert, 23 Ore. 548, 32 Pac. 508; Turner v. Cole, 31 Ore. 154, 49 Pac. 971.

Texas: Toyaho Creek Irr. Co. v. Hutchins (Tex. Civ. App., 1899) 52 S. W. 101.

Utah: Under Rev. St. Utah, 1898, § 1281, water rights appurtenant to land pass by a conveyance of the land unless expressly reserved in the deed, or may be treated as personal property, and separately conveyed. Snyder v. Murdock (Utah, 1899) 59 Pac. 91; Fisher v. Bountiful City (Utah, 1899) 59 Pac. 520.

Wyoming: Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025; McPhail v. Forney, 4 Wyo. 556, 35 Pac. 773.

8 Williams v. Harter, 121 Cal. 47, 53 Pac. 405; Arnett v. Linhart, 21 Colo. 188, 40 Pac. 355.

9 Arnett v. Linhart, 21 Colo. 188, 40 Pac. 355. In this case it was held that a conveyance of land, and also a half interest in a ditch, operated to convey a half interest in the ditch and water right, and also as a reservation of a like interest in both.

10 Arnett v. Linhart, 21 Colo. 188, 40 Pac. 355; Gelwicks v. Todd, 24 Colo. 494, 52 Pac. 788; Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. 1020.

11 Arnett v. Linhart, 21 Colo. 188, 40 Pac. 355.

purtenance to the land when this appears to be the intention of the parties.[12]

A right to conduct water across the land of another for irrigation passes by a conveyance of the land irrigated as an appurtenance thereto.[13] So, also, an irrigating ditch dug across the land of another is an appurtenance to the land irrigated, and will pass with it upon a sale thereof.[14]

§ 79. Conveyances of Water Right Separate from Land.

In the preceding section we found that a water right might be conveyed along with the land in connection with which it exists, or the water is used. We will now consider the sale of such right separate from the land. As has been already stated, the right of a riparian proprietor to the flow of a stream of water over his land is annexed to the soil as an incident thereto, and is considered part and parcel of it, but this right may nevertheless be severed from the land by grant, condemnation or prescription.[15] This intimate connection of the water right and the land must be borne in mind in considering the question of a transfer of such right by the riparian proprietor to other persons. The right is a right to use the water on the riparian lands, and not on lands that are not riparian. As the proprietor himself cannot, as against inferior proprietors, divert the water to non-

[12] Gelwicks v. Todd, 24 Colo. 494, 52 Pac. 788. See, contra, the earlier case in the court of appeals,—Child v. Whitman, 7 Colo. App. 117, 42 Pac. 601. And see Chamberlain v. Amter, 1 Colo. App. 13, 27 Pac. 87.

[13] Coventon v. Seufert, 23 Ore. 548, 32 Pac. 508.

[14] See Nelson v. Clerf, 4 Wash. 405, 30 Pac. 716.

[15] Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217; Gould v. Stafford, 91 Cal. 146, 17 Pac. 543.

riparian lands, he cannot confer this right upon others, and hence any conveyance by a riparian proprietor of the right to use the water of the stream will be void as to inferior proprietors, whose rights are affected thereby.[16] As against himself, however, or his grantee, he may contract for the diversion of the water to nonriparian lands, though such contract will not affect the rights of lower proprietors.[17]

In the case of water rights acquired by appropriation, very different principles apply from those just considered in connection with the water rights of a riparian proprietor. The right of the appropriator in no way depends upon the use of the water upon any particular land, but both the use for which the water was appropriated, and the place of application, may be changed at the will of the appropriator, subject only to the condition that no rights of other persons be thereby impaired.[18] It follows necessarily that the water right is an independent right of property, and may exist separately from the ditch or land in connection with which the right was acquired. The ownership of the ditch or land may be entirely distinct from the right to divert the water. Hence, a conveyance of the ditch or land does not necessarily pass the water right, but either may be conveyed separately from the other.[19]

[16] Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623; Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577.

[17] Doyle v. San Diego Land & Town Co., 46 Fed. 709; Gould v. Stafford, 91 Cal. 146, 27 Pac. 543; Yocco v. Conroy, 104 Cal. 468, 38 Pac. 107; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577.

[18] See ante, §§ 45, 50.

[19] Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. 313; Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854; Arnett v. Linhart, 21 Colo. 188, 40 Pac. 355; Gelwicks v. Todd, 24 Colo.

§ 80. Formalities of Conveyance.

An irrigating ditch being a part of the realty, title to the ditch, or any interest therein, can be acquired only by deed, prescription or condemnation,—a verbal transfer is insufficient.[20] So, also, an interest in a ditch and water right should be transferred in the same manner, and with the same formalities which attend conveyances of other real property.[21] The same principle will undoubtedly hold where the water right itself is sold independently of any interest in the land or ditch;[22] and the general rule may be laid down that any transfer of an irrigating ditch without the water right, or of the water right without the ditch, or of a ditch and water right together, should be by deed.[23] So, also, any agreement for a conveyance of a ditch and water right is within the statute of frauds, and should be

494, 52 Pac. 788; Cache La Poudre Irr. Co. v. Larimer & Weld Reservoir Co., 25 Colo. 144, 53 Pac. 318; Ada County Farmers' Irr. Co. v. Farmers' Canal Co., (Idaho, 1898) 51 Pac. 990; Wold v. May, 10 Wash. 157, 38 Pac. 875; McPhail v. Forney, 4 Wyo. 556, 35 Pac. 773. See, also, Clifford v. Larrien (Ariz., 1886) 11 Pac. 397; McLear v. Hapgood, 85 Cal. 555, 24 Pac. 788.

Where a deed conveyed an interest in a ditch and water right, "with the appurtenances," it was held to be error to rule, as a matter of law, that lateral ditches, not mentioned in the deed, and not shown by the terms thereof to be essential to the enjoyment of the rights conveyed, were included as appurtenances, and to exclude oral testimony to the contrary. Carman v. Staudaker, 20 Mont. 364, 51 Pac. 738.

20 Smith v. O'Hara, 43 Cal. 371; Burnham v. Freeman, 11 Colo. 601, 19 Pac. 761; Child v. Whitman, 7 Colo. App. 117, 42 Pac. 601.

21 Child v. Whitman, 7 Colo. App. 117, 42 Pac. 601.

22 See Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054.

23 See cases cited in three notes immediately preceding.

in writing.[24] The general rule above stated is subject to a modification where the ditch and water rights are considered simply as improvements upon the land, in the sense in which buildings and fences are improvements, and not as independent rights of property. In such case, any transfer that is sufficient to pass title to the land will vest in the purchaser the ditches and water rights thereon. Thus, where an appropriation is made by a settler on public lands, in whom the legal title has not yet vested, and whose right to the land, therefore, is merely possessory, and hence may be sold or transferred without any formal deal of conveyance, a verbal sale of such possessory title will carry with it the water right also as a necessary incident to the complete enjoyment of the land, unless such right be expressly reserved.[25]

In accordance with the general rule governing conveyances of real estate, it is held that a conveyance of a water right is valid as between the parties, although not acknowledged or recorded.[26] And where a statute declares that conveyances of real estate not duly recorded shall be void as to a subsequent purchaser of such real estate, whose conveyance shall be first duly recorded, an appropriator of water is not a purchaser, in the sense of the statute, and a prior conveyance of the water right, although not acknowledged or recorded, is valid against him.[27]

[24] Hayes v. Fine, 91 Cal. 391, 27 Pac. 772.

[25] McDonald v. Lannen, 19 Mont. 78, 47 Pac. 648; Wood v. Lowney, 20 Mont. 273, 50 Pac. 794; Hindman v. Rizor, 21 Ore. 112, 27 Pac. 13; Low v. Schaffer, 24 Ore. 239, 33 Pac. 678; Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314.

[26] Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054.

[27] Id.

§ 81. Contracts and Licenses Affecting Water Rights.

A right to the use of water for irrigation may be acquired by contract with the owner of the right.[28] So, also, several persons having the right to use water may enter into contracts with each other to secure to themselves, respectively, the better enjoyment of the water.[29] Although contracts affecting water rights and ditches, as relating to realty, are within the statute of frauds, rights growing out of such contracts will be enforced by a court of equity when there has been such performance of the contracts as to take them out of the operation of the statute.[30]

A parol license to divert and use water is ordinarily revocable, and vests in the licensee no title to the water.[31] But such license cannot be revoked where it has been fully executed, and the licensee, relying upon the license, has expended money or performed labor in making valuable and

[28] For example and construction of such contracts, see Ferrea v. Chabot, 63 Cal. 564, 121 Cal. 233, 53 Pac. 689, 1092. Durkee v. Cota, 74 Cal. 313, 16 Pac. 5; Natoma Water & Min. Co. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334; Sefton v. Prentice, 103 Cal. 670, 37 Pac. 641; Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; Houston v. Bybee, 17 Ore. 140, 20 Pac. 51.

The tender of water certificates issued by an irrigation company, securing to the holder a specified flow of water, is a sufficient offer of performance of a contract to convey a good and sufficient water right to the quantity represented by such certificates. Fairbanks v. Rollins (Cal., 1898) 54 Pac. 79.

As to contracts with irrigation companies, see post, § 131.

[29] See Weill v. Baldwin, 64 Cal. 476, 2 Pac. 249; Coffman v. Robbins, 8 Ore. 279; Combs v. Slayton, 19 Ore. 99, 26 Pac. 661.

[30] Tynon v. Despain, 22 Colo. 240, 43 Pac. 1039; McLure v. Koen, 25 Colo. 284, 53 Pac. 1058; Coffman v. Robbins, 8 Ore. 279; Combs v. Slayton, 19 Ore. 99, 26 Pac. 661.

[31] Jensen v. Hunter (Cal., 1895) 41 Pac. 14.

permanent improvements upon his property.[32] It is held, however, that the parol license so sanctioned and upheld must be something more than a passive acquiescence on the part of the owner of the water right, and must be founded on a valuable consideration, for otherwise the owner of the water right might be deprived thereof by seeing his neighbor constructing a ditch, and making no objection thereto until the water was diverted, under an honest belief that he intended to use only the surplus water.[33] One who grants a parol license to divert water for the irrigation of certain land is not thereby estopped to enjoin the diversion of such water for the irrigation of other land.[34]

32 Smith v. Green, 109 Cal. 228, 41 Pac. 1022; Curtis v. La Grande Hydraulic Water Co., 20 Ore. 34, 23 Pac. 808, 25 Pac. 378; McBoom v. Thompson, 25 Ore. 559, 37 Pac. 57; Garrett v. Bishop, 27 Ore. 349, 41 Pac. 10; North Powder Milling Co. v. Coughanour (Ore., 1898) 54 Pac. 223; Bowman v. Bowman (Ore., 1899) 57 Pac. 546; Lavery v. Arnold (Ore., 1899) 57 Pac. 906.

33 Lavery v. Arnold (Ore., 1899) 57 Pac. 906.

34 North Powder Milling Co. v. Coughanour (Ore., 1898) 54 Pac. 223.

CHAPTER VIII.

ABANDONMENT, ADVERSE USER AND ESTOPPEL.

§ 82. Abandonment—Loss of Water Right by Abandonment or Nonuser.
83. Same—Abandonment and Nonuser Distinguished.
84. Same—Abandonment of Ditch without Abandonment of Water Right.
85. Same—What Constitutes Abandonment.
86. Same—Transfer of Water Right as Abandonment.
87. Same—Proof of Abandonment.
88. Adverse User—Water Right may be Acquired by Adverse User.
89. Same—Acquisition of Water Right by Appropriation and by Prescription Contrasted.
90. Same—User must be Adverse—What Constitutes Adverse User.
91. Same—User must be Continuous.
92. Same—Proof of Adverse User.
93. Same—No Adverse User as against the United States.
94. Estoppel—Water Right Lost by Estoppel.

§ 82. Abandonment—Loss of Water Right by Abandonment or Nonuser.

As we have seen in previous sections, a right to use water for irrigation may be acquired by appropriation or by grant. We are now to consider some other modes in which a water right may be acquired or lost, and will take up first the subject of the loss of water rights by abandonment or nonuser.

As has been stated in a previous section, the right of a riparian proprietor at common law to the use of the water of a stream is in no way dependent upon user, and hence

cannot be lost by nonuser or abandonment.[1] In this respect an important difference exists between the rights of a riparian proprietor and rights acquired by appropriation. The right of the appropriator is based, in the first instance, upon the actual diversion of the water, and its application to a beneficial use, and the continuance of the right depends upon the continued use of the water, and hence the right acquired by prior appropriation may be lost by abandonment or nonuser.[2] Where a right to water has been thus lost by abandonment, the water is subject to a new appropriation.[3] And the appropriator himself may make a new appropriation of the water if, after having abandoned his right, he returns, and resumes possession, no adverse interests having been in the meanwhile acquired.[4]

Like a water right, an easement in an irrigating ditch over the land of another may be lost by abandonment.[5]

§ 83. Same—Abandonment and Nonuser Distinguished.

In considering the question of the loss of water rights on account of the failure to make use of the water, it is im-

1 See ante, § 12.

2 Hewitt v. Story, 51 Fed. 101; Davis v. Gale, 32 Cal. 27; Utt v. Frey, 106 Cal. 392, 39 Pac. 807; Smith v. Green, 109 Cal. 228, 41 Pac. 1022; Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453; Id., 120 Cal. 86, 52 Pac. 139; Dorr v. Hammond, 7 Colo. 79, 1 Pac. 693; New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. 1047; Hindman v. Rizor, 21 Ore. 112, 27 Pac. 13; Cole v. Logan, 24 Ore. 304, 33 Pac. 568; Low v. Rizor, 25 Ore. 551, 37 Pac. 82; Morrison v. Winn, 17 Utah, 484, 54 Pac. 761. See, also, Water Supply & Storage Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. 496.

3 Smith v. Green, 109 Cal. 228, 41 Pac. 1022.

4 Tucker v. Jones, 8 Mont. 225, 19 Pac. 571.

5 Stalling v. Ferrin, 7 Utah, 477, 27 Pac. 686.

portant to bear in mind an essential distinction between abandonment and nonuser, as affecting the period of time within which the forfeiture is complete. If the appropriator has in fact abandoned his right, the length of time for which he has ceased to use the water is wholly immaterial, for the moment the abandonment itself is complete, the rights of the appropriator are extinguished. But in the case of mere nonuser, the rights of the appropriator are not affected until he has failed to make any beneficial use of the water for the prescriptive period, when they become extinguished, although the conduct of the appropriator with reference to the property may negative the idea of abandonment.[6]

The nonuser must continue for a period sufficient to bar the right by lapse of time. In the absence of any legislative declaration on the subject, this period is held by analogy to be the period fixed by law for the limitation of actions to recover real property.[7] Where an appropriator ceases to use the water appropriated for a time, but afterwards resumes the use of a portion of it before the expiration of the period of limitations, he does not lose his right, as to such portion, by nonuser.[8]

A statute providing that, when an appropriator or his successor in interest ceases to use the water for some useful

6 Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453.

7 This period is, in California, five years. Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453.

A perpetual right to use water from an irrigating ditch, reserved in a contract, constitutes an easement in the ditch, and cannot be lost or abandoned by nonuser alone short of the period for the limitation of actions to recover real property. People v. Farmers' High Line Canal & Reservoir Co., 25 Colo. 202, 54 Pac. 626.

8 Smith v. Logan, 18 Nev. 149, 1 Pac. 678.

or beneficial purpose, his right ceases, deals with a forfeiture by nonuser merely, and does not contemplate the loss of the right by abandonment, and hence, in applying the statute, the question to be considered is whether the nonuser has continued for a period sufficient to work a forfeiture of the right.[9]

§ 84. Same—Abandonment of Ditch without Abandonment of Water Right.

Since a water right and the ditch by which the water is conveyed are independent subjects of property, an irrigating ditch may be abandoned without an abandonment of the water right, as where old ditches are abandoned, and new ditches substituted therefor for the conveyance of the same water.[10]

§ 85. Same—What Constitutes Abandonment.

It is sometimes a matter of difficulty in a particular case to determine whether or not a water right has been abandoned,—that is, whether the acts of the owner of the water right in respect thereto constitute an abandonment. The difficulty, however, is one of proof merely, for the general doctrine as to what constitutes abandonment is well settled. Abandonment is a matter of both intention and act,[11] and consists in the relinquishment of possession without any

9 Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453.

10 McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060; Greer v. Heiser, 16 Colo. 306, 26 Pac. 770; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278; New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989; Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. 5.

11 Nichols v. Lantz, 9 Colo. App. 1, 47 Pac. 70; Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959.

present intention to repossess.[12] Mere nonuser is not in itself an abandonment,[13] though, if continued for a sufficient length of time, it may result in a forfeiture of the water right by prescription.[14] The intention of the party is always a controlling consideration on the question of abandonment.[15] To constitute an abandonment, there must be both a relinquishment of possession or nonuser, and the intention to abandon. Either, without the other, is insufficient.[16]

But while mere nonuser does not amount to abandonment, it is competent evidence on the question of abandonment, and, if continued for an unreasonable period, it may create a presumption of an intention to abandon, and may warrant the deduction of the fact of abandonment. This presumption, however, is not conclusive, and may be overcome

[12] Utt v. Frey, 106 Cal. 392, 39 Pac. 807.

[13] People v. Farmers' High Line Canal & Reservoir Co., 25 Colo. 202, 54 Pac. 626; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. 1056; Ada County Farmers' Irr. Co. v. Farmers' Canal Co. (Idaho, 1898) 51 Pac. 990; Tucker v. Jones, 8 Mont. 225, 19 Pac. 571; Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959; Sloan v. Glancy, 19 Mont. 70, 47 Pac. 334; Arnold v. Passavant, 19 Mont. 575, 49 Pac. 400; Turner v. Cole, 31 Ore. 154, 49 Pac. 971.

[14] See ante, § 83.

[15] Utt v. Frey, 106 Cal. 392, 39 Pac. 807; Beaver Brook Reservoir & Canal Co. v. St. Vrain Reservoir & Fish Co., 6 Colo. App. 130, 40 Pac. 1066; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. 1056; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. 1047; Ada County Farmers' Irr. Co. v. Farmers' Canal Co. (Idaho, 1898) 51 Pac. 990; Tucker v. Jones, 8 Mont. 225, 19 Pac. 571; Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054; Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959; Hindman v. Rizor, 21 Ore. 112, 27 Pac. 13; Low v. Schaffer, 24 Ore. 239, 33 Pac. 678; Turner v. Cole, 31 Ore. 154, 49 Pac. 971.

[16] Utt v. Frey, 106 Cal. 392, 39 Pac. 807.

by other satisfactory evidence.[17] A corporation having, under its charter, the exclusive right to divert, use and control the waters of a stream for agricultural and other purposes, cannot allow such right to remain in abeyance for a long series of years, and thereafter assert the same to the exclusion of those who have, in the meantime, acquired rights to the use of such waters by actual appropriation and use, in pursuance of the general laws of the state.[18]

Where a water right is owned by several persons as tenants in common, the failure of one of them to use his full share of the water is not an abandonment of the right to the water not used, where such water is used by his cotenants, for one tenant in common may preserve the common estate for the benefit of his cotenants.[19]

§ 86. Same—Transfer of Water Right as Abandonment.

A valid transfer of a water right is, of course, not an abandonment thereof, but simply passes the right of the transferror to the transferee.[20] Thus, a mortgage of a water right is not an abandonment.[21] And a parol transfer by a settler on public land of his right to the land and the water right appurtenant thereto, although made without consideration, being sufficient to pass title to the land and water right, is not an abandonment of the land or water right.[22] So,

17 Davis v. Gale, 32 Cal. 27; Utt v. Frey, 106 Cal. 392, 39 Pac. 807; Sieber v. Frink, 7 Colo. 148, 2 Pac. 901.

18 Platte Water Co. v. Northern Colorado Irr. Co., 12 Colo. 525, 21 Pac. 711.

19 Cache La Poudre Irr. Co. v. Larimer & Weld Reservoir Co., 25 Colo. 144, 53 Pac. 318; Moss v. Rose, 27 Ore. 595, 41 Pac. 666.

20 Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054.

21 Smith v. Denniff (Mont., 1900) 60 Pac. 398.

22 Wood v. Lowney, 20 Mont. 273, 50 Pac. 794.

also, a grant of a ditch and water right to an alien is not an abandonment by the grantor, for an alien may take real estate, and hold the same against collateral attacks by third persons other than the sovereign until office found, and, in the absence of forfeiture by office found, may convey title to his grantee.[23]

It has been held that a verbal sale and transfer of his water right by a prior appropriator, when insufficient to pass title, operates ipso facto as an abandonment of the right; this, presumably on the ground that the grantor, by such attempted or invalid sale, manifests an intent to give up his right, which right, however, the grantee under the invalid grant cannot take, the result being that the right is lost to the grantor, and does not pass to the grantee,—that is, is simply abandoned.[24]

§ 87. Same—Proof of Abandanment.

The question whether or not a water right has been abandoned is one of fact, to be determined by the jury, or by the court, sitting as such.[25] Where the appropriator continues in the use of his rights without any unreasonable voluntary cessation, an abandonment will not be presumed against him.[26] On the contrary, forfeitures are not favored, and an appropriator will not be held to have abandoned his right except upon reasonably clear and satisfactory evidence.[27]

[23] Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741.

[24] Low v. Schaffer, 24 Ore. 239, 33 Pac. 678, citing Smith v. O'Hara, 43 Cal. 371. And see the mining case, Barkley v. Tieleke, 2 Mont. 89. But see Hindman v. Rizor, 21 Ore. 112, 27 Pac. 13.

[25] Utt v. Frey, 106 Cal. 392, 39 Pac. 807.

[26] Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278.

[27] Rominger v. Squires, 9 Colo. 327, 12 Pac. 213; Beaver Brook

There must be a manifest intention on his part to abandon his right this intention to be determined from his declarations and acts in relation thereto.[28] The burden of proving an abandonment rests upon the party asserting it.[29]

§ 88. Adverse User—Water Right may be Acquired by Adverse User.

The right to the use of water for irrigation may be acquired not only by original appropriation or by grant, but also, as against individuals in whom the right is vested, by adverse possession and use.[30] Such prescriptive right may be acquired either against one who has acquired his right to the water by prior appropriation or otherwise,[31] or against one who, as a lower riparian proprietor, is entitled to the natural flow of the stream as it passes through his lands; for, while a riparian proprietor does not lose his right, as such

Reservoir & Canal Co. v. St. Vrain Reservoir & Fish Co., 6 Colo. App. 130, 40 Pac. 1066; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. 1047; Ada County Farmers' Irr. Co. v. Farmers' Canal Co. (Idaho, 1898) 51 Pac. 990.

28 Hindman v. Rizor, 21 Ore. 112, 27 Pac. 13; Low v. Shaffer, 24 Ore. 239, 33 Pac. 678.

29 Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. 1056; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. 1047; Beaver Brook Reservoir & Canal Co. v. St. Vrain Reservoir & Fish Co., 6 Colo. App. 130, 40 Pac. 1066.

30 Davis v. Gale, 32 Cal. 27; Cox v. Clough, 70 Cal. 345, 11 Pac. 732; Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Coonradt v. Hill, 79 Cal. 587, 21 Pac. 1099; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217; Spargur v. Heard, 90 Cal. 221, 27 Pac. 198; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. 883; Smith v. Logan, 18 Nev. 149, 1 Pac. 678; Trambley v. Luterman, 6 N. M. 15, 27 Pac. 312; Baker v. Brown, 55 Tex. 377; Mud Creek Irr., etc., Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078.

31 See cases cited in preceding note.

proprietor, to the natural flow of the stream by a simple failure to use the water,[32] the right to divert the water may nevertheless be acquired against him by prescription.[33]

§ 89. Same—Acquisition of Water Right by Appropriation and by Prescription Contrasted.

There is a two-fold distinction between the acquisition of a water right by appropriation and the acquisition of such right by prescription. In the first place, the right to the use of water may be acquired by appropriation upon the public domain against the United States, while a prescriptive right cannot be acquired against the United States, but only by one private individual against another. Again, in order to perfect the right by appropriation, it is not necessary that the water should be used for any given length of time, while time and adverse use are essential elements to the perfection of a prescriptive right. One who claims a right by prescription must use the water continuously, uninterruptedly, and adversely for at least the prescriptive period, after which time the law will conclusively presume an antecedent grant to him of such asserted right.[34]

§ 90. Same—User must be Adverse—What Constitutes Adverse User.

In order to sustain a claim to a prescriptive right to the

[32] See ante, § 12.

[33] Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Coonradt v. Hill, 79 Cal. 587, 21 Pac. 1099; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217; Messenger's Appeal, 109 Pa. St. 285, 4 Atl. 162; Baker v. Brown, 55 Tex. 377.

[34] Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453.

use of water, the use upon which such claim is based must, of course, be adverse,—that is to say, it must be accompanied by all the elements necessary to constitute adverse possession and use. The claimant must have used the water continuously, uninterruptedly and adversely for the full prescriptive period.[35] The acts by which it is sought to establish the prescriptive right must be such as to operate as an invasion of the right of the person against whom the prescriptive right is asserted, and will give a cause of action in his favor.[36] No adverse user can be initiated until the owners of the water right are deprived of the benefit of its use in such a substantial manner as to notify them that their rights are being invaded.[37]

From these principles, it follows that no prescriptive right to water can be acquired by the use thereof by permission or

[35] Egan v. Estrada (Ariz., 1899) 56 Pac. 721; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623; Cox v. Clough, 70 Cal. 345, 11 Pac. 732; Oneto v. Restano, 78 Cal. 374, 20 Pac. 743; Id., 89 Cal. 63, 26 Pac. 788; Heintzen v. Binninger, 79 Cal. 5, 21 Pac. 377; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76; Paige v. Rocky Ford Canal & Irr. Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217; Last Chance Water Ditch Co. v. Heilbron, 86 Cal. 1, 26 Pac. 523; Ball v. Kehl, 95 Cal. 606, 30 Pac. 780; Natoma Water & Min. Co. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. 883; Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. 762; Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453; Huston v. Bybee, 17 Ore. 140, 20 Pac. 51; Smith v. North Canyon Water Co., 16 Utah, 194, 52 Pac. 283; Center Creek Water & Irr. Co. v. Lindsay (Utah, 1900) 60 Pac. 559.

The adverse user must continue for the full prescriptive period. Lavery v. Arnold (Ore., 1899) 57 Pac. 906. In Texas, this period, by analogy, is the same as that required to bar the right of entry to land,—that is, ten years. Baker v. Brown, 55 Tex. 377.

[36] Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,-

sufferance of the owner, who continues to exercise dominion over it.[38] So, also, where there is sufficient water in the stream to supply the wants and demands of all the parties, its use by one cannot be an invasion of the rights of any other, and hence cannot be the foundation of any prescriptive claim.[39] Again, since a riparian proprietor has no interest in the water of a stream after it has passed his land, and hence cannot complain of its diversion and use by lower proprietors, the diversion and use by a lower proprietor of the water which the upper proprietor has permitted to flow down from his land cannot amount to an invasion of the rights of the latter, and is not adverse, in the sense required to give a right by prescription.[40]

A mere claim of a right to the use and enjoyment of water, however long continued, will not ripen into adverse title thereto. There must be the actual appropriation of the water, followed by open, notorious, continuous and exclusive possession, under claim of title, for the statutory pe-

371; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18.

37 Bowman v. Bowman (Ore., 1899) 57 Pac. 546; Boyce v. Cupper (Ore., 1900) 61 Pac. 642.

38 Crawford v. Minnesota & M. Land & Imp. Co., 15 Mont. 153, 38 Pac. 713. To the same effect, see Egan v. Estrada (Ariz., 1899) 56 Pac. 721; Bathgate v. Irvine (Cal., 1899) 58 Pac. 442.

39 Egan v. Estrada (Ariz., 1899) 56 Pac. 721; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. 395; North Powder Milling Co. v. Coughanour (Ore., 1898) 54 Pac. 223.

40 Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18; Bathgate v. Irvine (Cal., 1899) 58 Pac. 442; Mud Creek Irr., etc., Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078.

iod.[41] Statutory appropriation, however, is not necessary, though it affords to one who seeks to acquire a right by prescription this advantage, that it gives to prior claimants notice that his user is adverse, and under claim of right, and sets the statute in motion against them.[42]

The mere construction of ditches for the purpose of using the water without actual use thereof is not sufficient to set the statute in motion, and the adverse user begins to run from the date the water was applied to the beneficial use and not from the time of constructing the ditch.[43]

§ 91. Same—User must be Continuous.

In order to acquire a right to the use of water by prescription, the user must not only be adverse, but must also be continuous for the required period. Any interruption of the user during the prescriptive period will prevent the acquisition of the right.[44] It is held, however, that merely disputing the right of the party claiming adversely will not prevent the bar of the statute. The peaceable possession of the adverse claimant must be disturbed, and its continuity broken, in order to constitute such an interruption.[45] The interruption here referred to is an interruption by the party against whom the adverse claim is asserted, and not a temporary interruption of the actual use of the water by the

[41] Cox v. Clough, 70 Cal. 345, 11 Pac. 732.

[42] Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217.

[43] Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Lavery v. Arnold (Ore., 1899) 57 Pac. 906.

[44] Cave v. Crafts, 53 Cal. 135; Last Chance Water Ditch Co. v. Heilbron, 86 Cal. 1, 26 Pac. 523; Bree v. Wheeler (Cal., 1900) 61 Pac. 782; Authors v. Bryant, 22 Nev. 242, 38 Pac. 439; Baker v. v. Brown, 55 Tex. 377.

[45] Cox v. Clough, 70 Cal. 345, 11 Pac. 732.

adverse claimant himself. The claimant will not be required to make actual use of the water at all times, whether he needs it or not, in order to make his use continuous. If he uses it at such times as he needs it throughout the prescriptive period, this is sufficient;[46] provided, of course, that he has at no time broken the continuity of his use by a technical abandonment. Any acknowledgment of the original owner's superior right to the water by the adverse claimant, as by offering to pay for the water or otherwise, during the statutory period, is such an interruption as will prevent the acquisition of title by adverse user.[47]

§ 92. Same—Proof of Adverse User.

To sustain a claim to a water right by adverse user, there should be clear proof of the adverse user, and the party who relies upon an adverse user as the foundation of his claim has the burden of proving that the water has been used adversely for the period required for the acquisition of title by prescription.[48] Thus, in the case of actions between cotenants, the burden of proving an ouster of a tenant in common of a water right, and adverse possession under the

[46] See Hesperia Land & Water Co. v. Rogers, 83 Cal. 10, 23 Pac. 196, in which the doctrine stated in the text was applied to the acquisition of an easement in an irrigating ditch over the land of another by adverse user.

[47] Ledu v. Jim Yet Wa, 67 Cal. 346, 7 Pac. 731; Jensen v. Hunter (Cal., 1895) 41 Pac. 14.

[48] Ball v. Kehl, 95 Cal. 606, 30 Pac. 780; Lavery v. Arnold (Ore., 1899) 57 Pac. 906; Smith v. North Canyon Water Co., 16 Utah, 194, 52 Pac. 283.

As to the posting of a notice claiming the water as evidence on the question of adverse possession, see City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197; Bathgate v. Irvine (Cal., 1899) 58 Pac. 442.

statute of limitations, devolves upon the cotenant who asserts it. The possession of one cotenant is presumed to be that of all, and an adverse holding will not operate as an ouster, and set the statute of limitations running, until the tenant out of possession has notice of such adverse holding. Such possession cannot be considered adverse unless there has been an actual ouster, or some act equivalent thereto.[49]

§ 93. Same—No Adverse User as Against the United States.

In accordance with the well-established principle of law, that the statute of limitations does not run against the government, it is held that no right to water can be acquired by adverse user, as against the United States, and hence a claim to a water right by prescription and adverse user will not avail, as against a purchaser of land from the United States, unless such adverse user has continued for the full prescriptive period after title has passed from the government.[50] But where the title to land has become vested in a private individual under an act of congress, a water right may be acquired as against the owner of the land by adverse possession, although a patent for the land may not have been issued. The rights of a patentee of public land, upon the issuance of the patent, relate back to the inception of his title, and hence the statute will begin to run against him from that

[49] Smith v. North Canyon Water Co., 16 Utah 194, 52 Pac. 283.

[50] Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,-371; Mathews v. Ferrea, 45 Cal. 51; Wilkins v. McCue, 46 Cal. 656; Jatunn v. Smith, 95 Cal. 154, 30 Pac. 200; Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453; Wood v. Etiwanda Water Co., 122 Cal. 152, 54 Pac. 726; Vansickle v. Haines, 7 Nev. 249. But see Neil v. Tolman, 12 Ore. 289, 7 Pac. 103; Tolman v. Casey, 15 Ore. 83, 13 Pac. 669.

time, if the use of the water has been already commenced, or from the time of the commencement of such use, if the grantee's rights have previously attached, and not from the date of the patent.[51]

§ 94. Estoppel—Water Right Lost by Estoppel.

A person having a right to the use or flow of water may, by his conduct, become estopped to object to its diversion and use by another. There is nothing peculiar in irrigation law in this respect, and the general law of estoppel applies.[52] Thus, one who passively stands by and permits another to expend money or labor in making improvements on land, and to divert and use water on such land, under an honest and reasonable belief that he has a right to such water, will be estopped to subsequently deny such right.[53] But mere

[51] Jatunn v. Smith, 95 Cal. 154, 30 Pac. 200; Wood v. Etiwanda Water Co., 122 Cal. 152, 54 Pac. 726.

[52] See, generally, Last Chance Water Ditch Co. v. Heilbron, 86 Cal. 1, 26 Pac. 523; Natoma Water & Min. Co. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334; Water Supply & Storage Co. v. Tenney, 24 Colo. 344, 51 Pac. 505; Lower Latham Ditch Co. v. Louden Irr. Canal Co. (Colo. Sup., 1900) 60 Pac. 629; Smyth v. Neal, 31 Ore. 105, 49 Pac. 850; Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147.

The fact that an upper riparian owner has "leased" from a lower proprietor the right to use the waters of the stream does not estop him, after the expiration of the lease, from asserting his right, as a riparian owner, to take water from the stream for necessary household purposes, and to make reasonable use of it for irrigation. Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561.

[53] Dalton v. Rentaria (Ariz., 1887) 15 Pac. 37; Curtis v. La Grande Hydraulic Water Co., 20 Ore. 34, 23 Pac. 808, 25 Pac. 378; Morrison v. Winn, 17 Utah, 484, 54 Pac. 761. See, also, Lavery v. Arnold (Ore., 1899) 57 Pac. 906; Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147. See, also, ante, § 81.

knowledge that another is diverting water under a claim of right does not create an estoppel.[54] So, also, permitting another to use water not needed by the owner of the right to the water, such right being acknowledged by the user, does not estop the owner from afterwards asserting his right.[55] Acquiescence in the interference of a water right does not impair such right unless continued for a time sufficient to create a bar by adverse user.[56].

[54] Bathgate v. Irvine (Cal., 1899) 58 Pac. 442.

[55] Thus, where a city, having the exclusive right to the use and control of the water of a stream, permits an individual to divert and use a portion of the water for the irrigation of his land, the right of the city to the water being acknowledged by such person, and no rights having accrued by adverse possession, the grantee of such person cannot restrain the city from closing his ditches when, by reason of his use, the quantity flowing in the stream becomes insufficient for the use of the city. Feliz v. City of Los Angeles, 58 Cal. 73.

[56] Mayberry v. Alhambra Addition Water Co. (Cal., 1898) 54 Pac. 530.

CHAPTER IX.

THE ADJUDICATION OF PRIORITIES.

§ 95. General Jurisdiction of Courts to Adjudicate Water Rights.
96. Determination of Quantity of Water to be Awarded.
97. The Decree—Certainty and Definiteness Required.
98. The Doctrine of Res Judicata.
99. Statutory Adjudication—Colorado System—Generally.
100. Same—Jurisdiction of Courts.
101. Same—The Decree.
102. Same—Proceedings before Referee.
103. Same—Review and Appeal.
104. Same—Independent Action.
105. Same—Some Observations on the Colorado System.
106. Statutory Adjudication—Wyoming System.
107. Statutory Adjudication—Washington, Nebraska, Montana, Utah and Oregon.

§ 95. General Jurisdiction of Courts to Adjudicate Water Rights.

Whether or not a prior right to the use of water for irrigation has been acquired by appropriation, and, if acquired, the extent of such right, are, of course, matters of fact to be established by evidence. As we have seen, in most of the states appropriators are required to place on record written evidence of their appropriations, by filing a notice of appropriation, or a statement of their respective claims. Compliance with these requirements has undoubtedly done much to lessen the probability of future controversy in respect to the rights claimed; but in view of the great number of facts, often difficult to prove, which may have to be shown in order to establish and define a claim to the use of water for irriga-

tion, and in view also of the jealousy with which these valuable rights are guarded in times of scarcity, it is not surprising that disputes and controversies often arise which the parties themselves are unable to settle.

The adjudication of water rights, like the determination of any other rights of property, where there is no statute providing otherwise, is, of course, a matter for the courts, and is subject to the ordinary rules of procedure in civil actions. In some states, however, special proceedings or tribunals are provided for by statute. In the present chapter we shall consider first the adjudication of priorities in ordinary civil actions, proceeding then to an examination of the special statutory provisions on the subject.

A court of equity has power to ascertain and determine the extent of the respective rights of several appropriators from a natural stream in the water of such stream, and to regulate the use of the water between them in such a way as to maintain equality of rights in the enjoyment thereof; and it may restrain by injunction any interference by a subsequent appropriator with the rights of a prior appropriator as ascertained and established by the court.[1]

Where, in a suit for the adjudication of water rights, a court of equity is unable to determine from the evidence the quantity of water to which a party is entitled, it may, as an incident to its equity jurisdiction, with or without the consent of the parties, refer the cause to a master for further investigation and consideration.[2] The rights of the parties are settled by the decree of the court,[3] which has, of course,

1 Frey v. Lowden, 70 Cal. 550, 11 Pac. 838; Barrows v. Fox (Cal., 1892) 30 Pac. 768.

2 Nephi Irr. Co. v. Jenkins, 8 Utah, 369, 31 Pac. 986.

3 Under a decree awarding to a party a constant flow of a cer-

power to enforce its decrees, and, if necessary, may prescribe the method to be employed to measure the water awarded.[4] But where, in an action to settle the water rights of various parties upon a stream, the court has established the priorities of appropriation, and the quantity of water appropriated by the various claimants, its functions are at an end, and it may not then dictate the manner in which an appropriator shall use the water appropriated by him, or when his right shall be exercised, so long as the water is used within the limits of the appropriation.[5]

Where a decree has been entered settling and adjusting the rights of various parties to the waters of a stream, and enjoining the use or appropriation of such waters other than as provided in the decree, the remedy for a violation of the provisions of the decree, where there is no change of parties, conditions or interests, is by an action at law, and not by a bill to enforce the decree.[6]

§ 96. Determination of Quantity of Water to be Awarded.

The chief concern of the court in an action between sev-

tain quantity of water, such party cannot use more than this quantity at any time, although he uses less water at another time, so as to use an average quantity equal to the continual flow awarded. Alhambra Addition Water Co. v. Richardson, 95 Cal. 490, 30 Pac. 577.

4 Tolman v. Casey, 15 Ore. 83, 13 Pac. 669. A court having jurisdiction of adjudication proceedings has power to locate a measuring box in order to secure the distribution of the water in accordance with its decree; and the fact that the land on which such box is to be located is unsurveyed government land does not affect the power of the court to locate the box. Elliot v. Whitmore, 10 Utah, 246, 37 Pac. 461.

5 McGinness v. Stanfield (Idaho, 1898) 55 Pac. 1020.

6 Raft River Land & Cattle Co. v. Langford (Idaho, 1896) 46 Pac. 1024.

eral appropriators for the adjudication of their respective rights is, of course, to determine the quantity of water to which each party is entitled under his appropriation. In the determination of this question, the court must be controlled by the general principles of law governing the appropriation of water, and defining the rights of the appropriator. To each party must be awarded that quantity of water, and no more, to which the evidence shows him to be entitled by virtue of a lawful appropriation. How much this is, as a matter of law, has been fully discussed in a previous chapter.[7] We have seen that an appropriator is entitled to only so much water as he has diverted and uses or needs for the proper irrigation of his land. In determining the quantity of water appropriated, therefore, the number of acres claimed or owned by each party, and the quantity of water needed to properly irrigate the same, should be taken into consideration.[8] The quantity of water needed in each case will obviously depend a good deal upon the mode of irrigation employed, as some modes are more wasteful of water than others; but in determining the quantity in any particular case, reference must be had to the system of irrigation in vogue in the particular locality as a standard, although other systems, more economical of water, might be adopted.[9]

An appropriator cannot claim more water than he diverts, and therefore the capacity of his ditch may sometimes be an important point to be considered.[10] The general rule is that the capacity of an irrigating ditch is measured by the amount of water, making due allowance for evaporation, seepage,

7 See ante, §§ 54-60.

8 Kirk v. Bartholomew, 2 Idaho, 1087, 29 Pac. 40.

9 Rodgers v. Pitt, 89 Fed. 420.

10 See ante, § 55.

etc., which it will carry from the point of diversion to the point of use, and the point of least carrying capacity fixes the general capacity of the ditch; though where a ditch is intended to supply, and does supply, water for use at various points along its course, the latter part of the ditch need not be so large as the first part.[11] The capacity of an irrigating ditch is a question of fact which does not require for its proof that the witnesses should possess unusual scientific attainments or peculiar skill, and it may be established by any competent testimony, as by witnesses qualified by many years' experience in mining and in measuring and selling water to miners, although not experts in the science of measuring water.[12] The opinion of a witness as to the grade of a ditch is competent evidence, subject, however, to be overcome by the other side by more accurate information, if such can be produced.[13]

The court is not required to attain mathematical exactness in measuring the flow of water, as between the several appropriators, but a reasonable approximation to substantial accuracy should be aimed at in determining controversies relating to the water supply.[14]

The rights of an appropriator are wholly independent of the needs of later appropriators, and therefore, on the question of priority of water rights acquired by prior appropriation, the question as to whether the stream furnishes a sufficient supply of water for all the parties is immaterial.[15]

11 Posachane Water Co. v. Standart, 97 Cal. 476, 32 Pac. 532.

12 Frey v. Lowden, 70 Cal. 550, 11 Pac. 838.

13 Posachane Water Co. v. Standart, 97 Cal. 476, 32 Pac. 532.

14 Union Mill & Min. Co. v. Dangberg, 81 Fed. 73; Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966. See, also, Neil v. Tolman, 12 Ore. 289, 7 Pac. 103.

15 Huning v. Porter (Ariz., 1898) 54 Pac. 584.

§ 97. The Decree—Certainty and Definiteness Required.

The judgment of the court in a proceeding for the adjudication of water rights is embodied in its findings or decree. The purpose of the decree is to fix and determine the respective rights and obligations of the parties to it, and the decree must therefore be sufficiently definite and certain in its terms to do this. A decree so uncertain and indefinite as to leave the controversy between the parties unsettled, and their respective rights and obligations undetermined, is void.[16] The main question to be decided is, of course, the quantity of water to which each party is entitled, and this must be stated with certainty, or in terms which can be rendered certain. In a number of states the mode of measuring water and the unit of measurement is prescribed by statute.[17] Where such mode or unit is prescribed, it seems that the decree, in stating the quantity of water, should conform to the statutory requirements. In Colorado the statute provides that the decree shall describe the amount of water awarded to a particular ditch by cubic feet per second of time, if the evidence shall show sufficient data to ascertain such cubic feet, and, if not, by width, depth and grade, and such other description as will most certainly and conveniently show the amount of water intended as the capacity of the ditch.[18] As a rule, the

16 In re Huntley, 85 Fed. 889; Dougherty v. Haggin, 56 Cal. 522; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76; Barrows v. Fox, 98 Cal. 63, 32 Pac. 811; Riverside Water Co. v. Sargent, 112 Cal. 230, 44 Pac. 560; Steinberger v. Meyer (Cal., 1900) 62 Pac. 483; Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541; Authors v. Bryant, 22 Nev. 242, 38 Pac. 439; Smith v. Phillips, 6 Utah, 376, 23 Pac. 932; Nephi Irr. Co. v. Jenkins, 8, Utah, 369, 31 Pac. 986; Nephi Irr. Co. v. Vickers, 15 Utah, 374, 49 Pac. 301.

17 Consult statutes in Appendix.

18 Mills' Ann. St. § 2403.

finding or decree should, if possible, be made definite by stating the quantity of water in some recognized and invariable unit of measure, as in defined inches or gallons, and not with reference to the capacity of the ditch; for the carrying capacity of a ditch is subject to change, being affected by the nature of the soil through which it passes, the rapidity and consequent scouring force of the current, the care it receives, etc., so that a finding or decree that a party is entitled to have his ditch supplied to its full capacity may lead to future disputes and litigation. And in California (where there is no statute similar to the Colorado statute above stated) such a judgment has been held bad for uncertainty.[19] Where the decree states the quantity of water awarded in inches, it must show further what kind of an inch is intended, for the term "inch" is itself indefinite. Thus, a decree that a party is entitled to "150 inches, statutory measurement," where it nowhere appears what statutory measurement is referred to, is void.[20] So, also, where the plaintiff alleged in his complaint that he was entitled to "five hundred inches, measured under a four-inch pressure," of the waters in controversy, a verdict of the jury that he was entitled to "forty inches, miners' measurement," was held void for uncertainty, since the term "miners' measurement" has no fixed meaning, and the miners' inch varies in different localities.[21] But although the findings are not explicit, if they will support the judgment, they will not be disturbed. Thus, where it was found that the claimants were entitled to all the water of the stream, which was

[19] Lakeside Ditch Co. v. Crane, 80 Cal. 182, 22 Pac. 76; Riverside Water Co. v. Sargent, 112 Cal. 230, 44 Pac. 560.

[20] In re Huntley, 85 Fed. 889.

[21] Dougherty v. Haggin, 56 Cal. 522.

much less than the amount claimed, it was held that a finding that the stream carried a certain number of inches would not be disturbed for failure to specify under what pressure the water was measured.[22] A decree awarding a party enough water to irrigate a stated number of acres has been held void for uncertainty where it did not otherwise appear how much water this would be.[23] But such a decree is sufficient where the quantity of water so designated is capable of being definitely ascertained.[24] A decree awarding a party the use of "one good irrigation stream of water" is fatally defective for want of certainty.[25]

Where, in an action to quiet title to the right to use the water of a stream, the plaintiff has been awarded all the water to which he is entitled, he cannot complain that the decree is indefinite as to the amount awarded to the defendant.[26]

The decree should state at what point the parties may take the water awarded to them, as by stating the quantity to which each party is entitled at the place where his ditch taps the stream.[27]

The findings of the court must be consistent; and findings that one of the parties acquired a water right by appropriation of a certain date, and the other party obtained a right to the water by a later appropriation, and also by adverse pos-

22 Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541.

23 Nephi Irr. Co. v. Vickers, 15 Utah, 374, 49 Pac. 301.

24 Broadmoor Dairy & Live Stock Co. v. Brookside Water & Imp. Co., 24 Colo. 541, 52 Pac. 792; McLure v. Koen, 25 Colo. 284, 53 Pac. 1058; Holman v. Pleasant Grove City, 8 Utah, 78, 30 Pac. 72.

25 Smith v. Phillips, 6 Utah, 376, 23 Pac. 932.

26 Power v. Switzer, 21 Mont. 523, 55 Pac. 32.

27 Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. 5.

session, being inconsistent, will not support a judgment in favor of the latter party.[28]

§ 98. The Doctrine of Res Judicata.

The decrees of a court of competent jurisdiction in a suit for the adjudication of water rights, when final and unreversed, like decrees in other suits, are res judicata of the subject-matter of the suits, as between the parties thereto and their successors in interest.[29] And this is true, whether the court based its opinion and decree upon a correct or an erroneous view either of the law or of the facts. The decrees are not conclusive, however, as to matters which might have been decided therein; but only as to such matters as were in fact decided, within the issues raised by the pleadings.[30] Nor are such decrees binding on persons who were not parties thereto.[31]

§ 99. Statutory Adjudication—Colorado System—Generally.

In Colorado the adjudication of priorities between irrigators has not been left to the ordinary mode of procedure of the courts. In 1879 the legislature, finding the ordinary processes of law and the actions then known to the courts too expensive and also inadequate to meet the novel conditions incident to the appropriation of water for the purposes of irri-

[28] Johnson v. Bielenberg, 14 Mont. 506, 37 Pac. 12.

[29] Union Mill & Min. Co. v. Dangberg, 81 Fed. 73; Neil v. Tolman, 12 Ore. 289, 7 Pac. 103. See post, § 101.

[30] Union Mill & Min. Co. v. Dangberg, 81 Fed. 73. But see, as to the conclusiveness of a former judgment as to matters which might have been litigated and decided, Neil v. Tolman, 12 Ore. 289, 7 Pac. 103.

[31] Tucker v. Jones, 8 Mont. 225, 19 Pac. 571.

gation, enacted a statute which, with the supplemental act of 1881, furnishes an elaborate system of procedure for the settlement of all questions of priority of appropriation of water between the owners of ditches, canals and reservoirs taking water from the same stream or its tributaries within the same water district.[32] A statutory proceeding to adjudicate priorities under these acts is not an ordinary civil action or proceeding, but is a proceeding sui generis, to which the rules governing ordinary civil actions are not always applicable.[33]

The act of 1881 completes and supplements the act of 1879, and "the two together constitute a complete system of procedure, that in operation has been found so salutary and free from unnecessary expense as to command the tacit indorsement of all subsequent legislatures."[34]

The acts provide substantially that whenever any one or more persons, associations or corporations interested as owners of any ditch, canal or reservoir in any water district, shall present to the district court of any county having jurisdiction of priorities in such district, or to the judge thereof in

[32] Mills' Ann. St. §§ 2400-2439. See, generally, as to the scope and effect of these acts, Union Colony v. Elliott, 5 Colo. 371; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278; Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. 787; Louden Irr. Canal Co. v. Handy Ditch Co., 22 Colo. 102, 43 Pac. 535; Broadmoor Dairy & Live Stock Co. v. Brookside Water & Imp. Co., 24 Colo. 541, 52 Pac. 792. In Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, Elliott, J., said of these acts: "They are in the nature of police regulations to secure the orderly distribution of water for irrigation purposes, and to this end they provide a system of procedure for determining the priority of rights as between the carriers."

[33] Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. 787.

[34] Louden Irr. Canal Co. v. Handy Ditch Co., 22 Colo. 102, 43 Pac. 535.

vacation, a motion, petition or application in writing, moving or praying said court to proceed to the adjudication of the priorities to the use of water for irrigation between the several ditches, etc., in such district, the court, or judge in vacation, shall, without unnecessary delay, in case he shall deem it practicable to proceed in open court, appoint a day in some regular or special term of such court for commencing to hear and take evidence in such adjudication, and shall at such time proceed to hear all evidence that may be offered by or on behalf of any person, association or corporation interested in any ditch, canal or reservoir in such district, either as owner of or consumer therefrom, in support of or against any claim of priority of appropriation by means of any ditch, canal or reservoir, or by any enlargement or extension thereof in such district, and, upon all the evidence and the arguments of the parties or their counsel, shall make and cause to be entered a decree determining and establishing the several priorities concerning which testimony shall have been offered.

Parties owning or claiming any interest in any ditch, canal or reservoir within any water district are required to file with the clerk of the district court having jurisdiction a statement of claim under oath containing their names and addresses, the name and general description of any ditch, canal or reservoir claimed, the name of the stream from which its supply of water is drawn, the date of appropriation by original construction, or by enlargement or extension, the amount of water claimed, the capacity of the ditch, canal or feeder, and the number of acres lying under and being or proposed to be irrigated by water from such ditch, canal or reservoir. No person, association or corporation representing any ditch, canal or reservoir is permitted to give or offer any evidence before a referee until such statement be filed by him or them.

The district court, or judge thereof in vacation, has power to make such orders and rules as may be necessary and expedient touching the proceedings in court or before a referee.

Notice of proceedings is required to be given to all parties interested; and provision is made for a review and reargument of decrees rendered, and also for appeals therefrom to the supreme court. The statute also provides for adjudication before a referee where the court or judge to whom application is made deems it impracticable or inexpedient to proceed in open court.

The acts provide for the adjudication of priorities of water rights for irrigation purposes only, and the statutory proceedings cannot be resorted to for the purpose of determining the claims of parties to the use of water for domestic or other purposes.[35]

An adjudication of priorities, within the meaning of the irrigation acts, is the judicial determination of the claims of different parties to the use of water for irrigation within the same water district. The acts provide for a separate adjudication of priorities for each district, but not for the settlement of priorities beyond the limits of the district. And where a district is divided, by an act of the legislature without any saving clause, during the pendency of adjudication proceedings, a new proceeding becomes necessary in the new district for the adjudication of the rights of all parties having ditches in the new district.[36]

The adjudication statutes were not intended to have, and do not have, any application beyond the limits of the state;

35 Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. 711.

36 Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. 787.

and where a ditch has its point of diversion in Colorado, but extends into another state or territory, carrying water for the irrigation of lands lying in such state or territory, priorities will not be decreed to such ditch in a proceeding under the statute for the irrigation of such lands.[37]

Proceedings under the adjudication act are for the sole purpose of ascertaining and adjudicating the priorities of right to the use of water between the several ditches, canals and reservoirs in the same water district. The statute invests the court with jurisdiction to establish the rank of the several ditches, etc., with relation to each other, based upon the different dates of appropriation, the quantity of water appropriated, and the means employed to utilize it, and to award to each the priority to which it may be entitled; but it does not authorize inquiry into the relative rights of co-claimants in the same ditch; or any adjustment of their disputes among themselves.[38] The decree is intended to settle the priority and extent of appropriation of each ditch, but not to designate the person or persons entitled to the control of the ditch or the use of the water appropriated thereby.[39]

Any person whose rights may be affected by an adjudication of priorities is entitled to be made a party to the proceedings.[40]

In a suit to determine priorities of right to the use of water for irrigation, whether the suit be the statutory proceeding or a suit in equity, it is not sufficient for the plain-

37 Lamson v. Vailes (Colo. Sup., 1900) 61 Pac. 231.

38 Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. 1056.

39 Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854.

40 Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278.

tiff to allege in his complaint merely that he has the priority of right. This is a legal conclusion. He must specifically aver all the substantive facts necessary to constitute such priority. The complaint should further state the capacity of the irrigation works, and the quantity of water appropriated thereby, and applied to a beneficial use, with such definiteness that a decree may be based upon it.[41]

§ 100. Same—Jurisdiction of Courts.

Prior to the acts of 1879 and 1881, the district courts of the state were by the state constitution clothed with original jurisdiction of all causes, both at law and in equity,[42] and they therefore had full and complete jurisdiction to hear and determine water priorities. By the act of 1879, jurisdiction for the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriation of water between ditch owners drawing water from the same stream or its tributaries within the same water district, and all other questions of law and of right growing out of or involved in or connected therewith, is vested exclusively in the district court of the proper county. Where a water district extends into two or more counties, the district court of the county in which the first regular term after the first day of December in each year shall soonest occur shall be the proper county in which to commence proceedings; but where such proceedings shall be once commenced by the entry of an order appointing a referee, such court shall thereafter retain exclusive jurisdiction of the

41 Church v. Stillwell, 12 Colo. App. 43, 54 Pac. 395. See, also, Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028.

42 Const. Colo. art. 6, § 11.

whole subject until final adjudication thereof is had.[43] The acts of 1879 and 1881 were passed for the purpose of establishing a system of procedure whereby the appropriators of water on any particular stream could have their priorities and rights determined in one proceeding, and they do not attempt to limit or extend the jurisdiction of the district court as to such rights.[44] Where a district court of one county acquires jurisdiction of a suit for the adjudication of priorities by the commencement of proceedings therein, such court, by the express provision of the statute, as above stated, has exclusive jurisdiction, and the district court of another county in the same water district has no jurisdiction of the cause.[45] But one who has been a party to adjudication proceedings in the district court of one county, and, without in any manner questioning the jurisdiction of that court to entertain the proceedings, has submitted to the adjudication of his rights therein, and has for several years enjoyed the right then decreed to him, will not be permitted, in a subsequent action in another county in the same district, to question the jurisdiction of the former court, on the ground that proceedings had previously been instituted in the court in which the later action was brought.[46]

§ 101. Same—The Decree.

After hearing the testimony and arguments of the parties or their counsel, and determining the matters put in evi-

[43] Mills' Ann. St. § 2400.

[44] Broadmoor Dairy & Live Stock Co. v. Brookside Water & Imp. Co., 24 Colo. 541, 52 Pac. 792.

[45] Louden Irr. Canal Co. v. Handy Ditch Co., 22 Colo. 102, 43 Pac. 535; Presbyterian College v. Poole, 25 Colo. 50, 52 Pac. 1103.

[46] Handy Ditch Co. v. South Side Ditch Co. (Colo. Sup., 1899) 58 Pac. 30.

dence, the court is required to make and cause to be entered a decree determining and establishing the several priorities of right by appropriation of water of the several ditches, canals and reservoirs in the water district, concerning which testimony shall have been offered, each according to the time of its construction and enlargement, or enlargements or extensions, designating the amount of water appropriated in each case by cubic feet per second of time, if the evidence shall show sufficient data to ascertain such cubic feet, and, if not, by width, depth and grade, and such other description as will most certainly and conveniently show the amount of water intended as the capacity of such ditch, canal or reservoir.

Each interested party is entitled to receive from the clerk, or payment of a reasonable fee therefor, a certificate under seal, showing the priority decreed to him, which certificate is is to be exhibited to the water commissioner of the district, who shall make an abstract thereof in a book, and shall constitute his warrant of authority for regulating the flow of water in relation to that particular ditch, canal or reservoir. Said certificate shall also be recorded in the records of each county into which the ditch, canal or reservoir to which it relates shall extend, and the certificate of record thereof, or a duly certified copy of such record, shall be prima facie evidence of so much of the decree as shall be recited therein.[47]

[47] Mills' Ann. St. §§ 2403, 2404. It is further provided that "the court, in making such decree, as aforesaid, shall number the several ditches and canals in the water district, concerning which adjudication is made, in consecutive order, according to priority of appropriation of water thereby made by the original construction thereof, as near as may be, having reference to the date of each

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The decrees rendered in adjudication proceedings, it should be noted, do not purport to grant any new property rights, but rather embody, in permanent form, the evidence of those previously acquired. The rights are acquired only by a lawful appropriation, and are measured by the extent of such appropriation; and the decree must award these rights in accordance with the testimony offered in support of each claim, and the law governing the appropriation of water.[48]

The district court has no authority in an adjudication proceeding to give any definite decree in favor of a ditch not then completed; and if such decree should be entered, it seems that the court would require not only that the ditch be completed, but that the water running through it be ac-

decree as rendered, and shall also number the reservoirs in like manner, separately from ditches and canals, and shall further number each several appropriation of water consecutively, beginning with the oldest appropriation, without respect to the ditches or reservoirs by means of which such appropriations were made, whether such appropriation shall have been made by means of construction, extension or enlargement, which number of each ditch, canal or reservoir, together with the number or numbers of any appropriations of water held to have been made by means of the construction, extension or enlargement thereof, shall be incorporated in said decree and certificate of the clerk, to be issued to the claimants, as provided in section one of this act, so as to show the order in priority of such ditch or canal, and of such reservoir, and also of such successive appropriation of water pertaining thereto, for the information of the water commissioner of the district in distributing water; such numbering to be as near as may be having reference to date of decrees as rendered." Section 2408.

[48] New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989. No one is entitled to have a priority adjudged him for more water than he has actually appropriated, nor for more than he actually needs. Priority of right must be limited by each of these considerations. Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278.

tually applied to a beneficial use before awarding to it any priority.[49] To constitute a valid appropriation of water, the water diverted must, of course, be applied within a reasonable time to a beneficial use, and the existence of this fact must be ascertained from the evidence before any priority can be awarded to a ditch. It is not necessary, however, that the decree shall state upon its face that the water appropriated was applied to a beneficial use.[50]

Parties who have participated in the benefits of a decree, and accepted its fruits by using the water decreed to them, are thereafter estopped from assailing its validity, and are bound by it.[51]

The determination of the court as to matters properly embodied in its decree, unless the proceedings be reopened in the manner and within the time provided in the act, is res judicata between the parties, and the proceedings cannot be reopened by one of the parties, in the absence of proof of fraud, for the purpose of making any material change or correction in the decree.[52] Thus, a mistake in the carrying capacity of a ditch, as determined by a decree, cannot be

49 Water Supply & Storage Co. v. Tenney, 24 Colo. 344, 51 Pac. 505. See, also, Water Supply & Storage Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. 496.

50 Broadmoor Dairy & Live Stock Co. v. Brookside Water & Imp. Co., 24 Colo. 541, 52 Pac. 792.

51 Boulder & Weld County Ditch Co. v. Lower Boulder Ditch Co., 22 Colo. 115, 43 Pac. 540; Handy Ditch Co. v. South Side Ditch Co. (Colo. Sup., 1899) 58 Pac. 30.

52 New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989; Louden Irr. Canal Co. v. Handy Ditch Co., 22 Colo. 102, 43 Pac. 535; Boulder & Weld County Ditch Co. v. Lower Boulder Ditch Co., 22 Colo. 115, 43 Pac. 540; Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 Pac. 444; Montrose Canal Co. v. Loutsenhizer Ditch Co., 23 Colo. 233, 48 Pac. 532; Water Supply &

corrected in a collateral proceeding after the statutory time for reformation or review in the court of original jurisdiction, or for taking an appeal, has elapsed.[53] So, also, a determination as to the quantity of water to which parties to the adjudication proceedings are entitled is res judicata.[54] But the decree is not res judicata as to matters not properly included therein. Thus, since decrees under these acts are not intended to determine the person or persons entitled to the use of the water appropriated, but only the relative priority pertaining to each ditch, such a decree is not res judicata as to the party or parties entitled to the control of a particular ditch, or to the use of water conveyed through the same, but only as to the priority and amount of appropriation of such ditch.[55]

The decrees rendered in adjudication proceedings are not res judicata as to persons not parties to the proceedings.[56]

Decrees entered under the adjudication acts, while not conclusive as between the different water districts, until found otherwise in some appropriate proceeding, are to be treated by the superintendents of irrigation, charged with the duty of distributing water according to the decrees rendered, without reference to the water district in which such decrees are

Storage Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. 496. See ante, § 98.

[53] Water Supply & Storage Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. 496.

[54] Boulder & Weld County Ditch Co. v. Lower Boulder Ditch Co., 22 Colo. 115, 43 Pac. 540.

[55] Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854.

[56] Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278. See, also, Lower Latham Ditch Co. v. Louden Irr. Canal Co. (Colo. Sup., 1900) 60 Pac. 629.

found, as prima facie correct, and he must be governed thereby and distribute the water accordingly.[57]

§ 102. Same—Proceedings before Referee.

If for any cause the judge of the district court to whom application is made for an adjudication of water rights shall deem it impracticable or inexpedient to proceed to hear the evidence in open court, he shall make an order appointing a referee before whom the adjudication proceedings shall be had. The referee is required to give notice to interested parties of a time and place for a hearing appointed by him, and is empowered to administer oaths to witnesses, issue subpoenas, require the presence of witnesses, take and hear testimony, and, generally, to exercise judicial powers in the premises. Upon closing the testimony it is the duty of the referee to examine all the testimony and proofs, and make an abstract of the same, to make separate findings of the facts connected with each ditch, etc., touching which evidence shall have been offered, and to prepare a draft of a decree in accordance with such findings, similar to the decrees entered by the court in such proceedings, and to return and file his report, with the evidence, abstract, findings and decree, with the clerk of the court. The report is then heard and determined by the court, any interested party having the privilege of appearing and excepting to any matter in the findings or decree. After the hearing the court causes the decree, or a modification thereof, or a new decree, as it shall determine, to be entered of record.[58]

57 Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 Pac. 444.

58 Mills' Ann. St. § 2409 et seq. The decree of the referee may be modified for error committed by him in his judgment upon the

Where a judge has appointed a referee to take testimony, and has made certain rules, in the exercise of his judicial discretion, for the government of the referee in the premises, a writ of mandamus will not be allowed to compel the judge to make other or further rules, on the ground that those made are inadequate to carry out the intent of the act.[59]

§ 103. Same—Review and Appeal.

Provision is made by the statute for both reargument or review of any decree, or an appeal therefrom from the district court to the supreme court. Thus it is provided that "the district court, or judge thereof in vacation, shall have power to order, for good cause shown, and upon terms just to all parties, and in such manner as may seem meet, a reargument or review, with or without additional evidence, of any decree made under the provisions of this act, whenever said court or judge shall find, from the cause shown for that purpose by any party or parties feeling aggrieved, that the ends of justice will be thereby promoted; but no such review or reargument shall be ordered unless applied for by petition or otherwise within two years from the time of entering the decree complained of."[60] This statute, allowing a review of a decree, contemplates that good cause must be shown therefor; that a petition for this purpose must state a cause of action,—that is to say, it must state facts from which it appears that the party applying for such reargument and review of a decree has been aggrieved thereby, so that the court to which the petition is addressed may determine, upon inspection, that if the facts stated be true, the decree should

weight of the testimony. Dorr v. Hammond, 7 Colo. 79, 1 Pac. 693.

59 Union Colony v. Elliott, 5 Colo. 371.

60 Mills' Ann. St. § 2425.

be modified. A petition stating only general allegations and conclusions of law, without specifically stating facts from which the court may determine as to the correctness or incorrectness of the decree assailed, is insufficient.[61]

The right of a party to have a decree reopened under this statute, in so far as it is based upon a cause existing at the time the decree was rendered, is conditioned upon his having at that time made objection to it, and saved an exception to an adverse ruling upon his objection. If a party knowingly and intentionally neglects to apprise the court of his objection to a decree at the time it is rendered, when he has full opportunity to do so, he may not afterwards file such objection, even though the statute allows two years within which to file a petition to reopen the decree.[62] The exceptions to a decree must be filed within the two years prescribed by the statute. And where a court, upon a petition being filed for a review within the statutory period, entered an order reopening the decree, and afterwards caused notice to be served on all interested parties, in response to which other parties than the original petitioners filed exceptions more than two years after the decree was entered, it was held that the court erred in entertaining the petitions so filed. In so holding, the supreme court proceeded upon the theory that the adjudication which the statutory proceedings contemplate results in and consists of separate, distinct and divisible parts of one general decree; there being as many such as there are separate ditches or rights existing. Hence, even though one

61 Crippen v. Burroughs (Colo. Sup., 1900) 60 Pac. 487; Rio Grande Land & Canal Co. v. Prairie Ditch Co. (Colo. Sup., 1900) 60 Pac. 726; Peterson v. Durkee (Colo. App., 1900) 62 Pac. 370.

62 Rio Grande Land & Canal Co. v. Prairie Ditch Co. (Colo. Sup., 1900) 60 Pac. 726.

or more parties affected by one clause or subdivision of the decree may, by bringing in proper parties within the statutory time, ask for and receive a modification as to that portion, this does not give the right to other persons interested in, or whose rights are established by, some other and separate clause of the general decree, and which are not affected by the former, a right to ask a review as to such portion, or to file exceptions generally, unless within the statutory time they come in as copetitioners, or are brought in as respondents.[63]

After the expiration of the time limited by the act, the decree cannot be reopened by a party thereto, in the absence of proof of fraud, for the purpose of making any material change or correction therein.[64] In a proceeding to reopen a decree, the statement filed by a claimant in the adjudication proceedings may be introduced along with the decree to enable the court to interpret or construe the decree.[65]

It is provided that any party or parties representing ditches, etc., affected by a decree, who may feel aggrieved thereby, may have an appeal from the district court to the supreme court;[66] the procedure for taking such appeal being

[63] Rio Grande Land & Canal Co. v. Prairie Ditch Co. (Colo. Sup., 1900) 60 Pac. 726. In so holding, Campbell, C. J., said: "Of course we do not intend to hold that the rights of such other parties may be cut off or impaired without an opportunity to be heard, but only that their right to the statutory remedy is barred by failing seasonably to avail themselves of it." As to the right to bring an independent action, see post, § 104.

[64] New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989; Boulder & Weld County Ditch Co. v. Lower Boulder Ditch Co., 22 Colo. 115, 43 Pac. 540.

[65] New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989.

[66] The supreme court has jurisdiction of appeals from the district court in this case, since a water right is a freehold estate within the meaning of section 388 of the Code, regulating the jurisdiction

prescribed by statute. The party or parties joining in the appeal must file in the district court a verified statement of claim and other particulars, and praying an appeal. If, on examination, the court or judge in vacation finds such statement in conformity with the prescribed requirements, an order is made allowing the appeal, and fixing the amount of the appeal bond. Copies of such order are required to be served on the appellees, and published, and proof of such service and publication must be filed with the clerk of the supreme court within sixty days, and the transcript of the record [67] within six months, after the appeal is allowed. The supreme court, in all cases in which judgment is rendered, and any part of the decree appealed from is reversed, and in which it may be practicable, shall make such decree in the matters involved in the appeal as should have been made by the district court, or direct in what manner the decree of that court should be amended.[68] The mode of taking appeals being regulated by the statute, the provisions of the Civil Code relative to appeals do not apply.[69]

The provisions of the statute directly relating to appeals are silent as to the time within which they may be taken. From the other provisions in the adjudication act, however, relating to the reargument and review of decrees within two

of appeals to the supreme court. Daum v. Conley (Colo. Sup. 1899) 59 Pac. 753. See, also, La Junta & L. Canal Co. v. Ft. Lyon Canal Co., 25 Colo. 515, 55 Pac. 728. And see ante, § 72.

67 As to the transcript of record and bill of exceptions, see Mills' Ann. St. § 2429; Kerr v. Dudley (Colo. Sup., 1899) 58 Pac. 610; Daum v. Conley (Colo. Sup., 1899) 59 Pac. 753.

68 See, generally, as to appeals, Mills' Ann. St. §§ 2427-2432.

69 Daum v. Conley (Colo. Sup., 1899) 59 Pac. 753; Upper Platte & B. Canal Co. v. Ft. Morgan Reservoir & Irr. Co. (Colo. Sup., 1900) 60 Pac. 484.

years, and the institution of original actions relating to rights affected by such decrees within four years, it seems that it was the intent of the legislature that such decrees should not be disturbed after a lapse of two years from the date of entry, except by such original actions. It is accordingly held that, since an appeal is not a new action, but a continuation of the original, appeals must be taken within two years from the time of entry.[70] The statement of claim to be filed with the clerk of the district court is required to be verified, but the statute does not direct by whom it shall be verified, and the verification may be by appellant's counsel.[71] A party does not waive his right to an appeal by applying for a rehearing and review of the decree in the district court.[72]

Where the case has been tried in the district court mainly upon proofs taken and reported by a master or referee, it is the duty of the supreme court, on appeal, to sift and weigh all the evidence, with a view to a just determination, uninfluenced by the proposition that the court below had superior facilities to judge of the credibility of witnesses.[73] But where a case was not tried wholly before a master or referee, or upon testimony so taken, but was heard upon the testimony taken upon a prior trial of the case, and upon oral testimony introduced at the trial, this principle does not apply, and the case comes rather within the general principle that the appellate court will disturb neither the verdict of the jury nor the finding of the trial court, unless it satisfactorily

[70] Upper Platte & B. Canal Co. v. Ft. Morgan Reservoir & Irr. Co. (Colo. Sup., 1900) 60 Pac. 484. See, also, Daum v. Conley (Colo. Sup., 1899) 59 Pac. 753.

[71] Daum v. Conley (Colo. Sup., 1899) 59 Pac. 753.

[72] Id. See, also, Kerr v. Dudley (Colo. Sup., 1899) 58 Pac. 610.

[73] Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Childs v. Lowenbruck, 2 Colo. App. 92, 29 Pac. 1014.

appears that the verdict or judgment is against the manifest weight of the evidence, or was the result of improper influences, motives or considerations.[74]

A decree based on a statute subsequently declared invalid will be reversed on appeal.[75]

§ 104. Same—Independent Action.

The acts of 1879 and 1881, while affording a complete system of procedure for the adjudication of priorities, do not, nevertheless, take away the right to maintain an independent action for this purpose, such as existed prior to the passage of these acts. It is expressly provided that "nothing in this act [of 1881], or in any decree rendered under the provisions thereof, shall prevent any person, association or corporation from bringing and maintaining any suit or action whatsoever hitherto allowed in any court having jurisdiction, to determine any claim of priority of right to water, by appropriation thereof, for irrigation or other purposes, at any time within four years after the rendering of a final decree under this act in the water district in which such rights may be claimed."[76] But, "after the lapse of four years from the

[74] Bugh v. Rominger, 15 Colo. 452, 24 Pac. 1046. See, also N. Y. Irrigating Ditch Co. v. Buffalo Creek Irr. Co., 25 Colo. 529, 55 Pac. 720, affirming 9 Colo. App. 438, 49 Pac. 264.

[75] Rio Grande Land & Canal Co. v. Prairie Ditch Co. (Colo. Sup., 1900) 60 Pac. 726.

[76] Mills' Ann. St. § 2434. The section continues with this proviso: "Save that no writ of injunction shall issue in any case restraining the use of water for irrigation in any water district wherein such final decree shall have been rendered, which shall effect [affect] the distribution or use of water in any manner adversely to the rights determined and established by and under such decree, but injunctions may issue to restrain the use of any water in such district not affected by such decree, and restrain violations of any

time of rendering a final decree, in any water district, all parties whose interests are thereby affected shall be deemed and held to have acquiesced in the same, except in case of suits before then brought, and thereafter all persons shall be forever barred from setting up any claim to priority of rights to water for irrigation in such water district adverse or contrary to the effect of such decree."[77] It is held that the right to bring an independent action under these provisions may be exercised only by a person, association or corporation not a party to the prior proceeding, or, if a party thereto, whose right of action grows out of matters arising subsequent to the decree.[78]

The failure of the claimant of a water right to file the statement of claim required previous to a statutory adjudication of his rights, and to apply for a review of the decree of the district court within the prescribed period of two years, does not raise the presumption that he had no rights, or that he intended to waive any rights he may have had; but under the sections set out above, he may, within four years, maintain an action to have a decree amended so as to

right thereby established, and the water commissioner of every district where such decree shall have been rendered shall continue to distribute water according to the rights of priority determined by such decree, notwithstanding any suits concerning water rights in such district, until in any suit between parties the priorities between them may be otherwise determined, and such water commissioner have official notice by order of the court or judge determining such priorities, which notice shall be in such form and so given as the said judge shall order."

[77] Mills' Ann. St. § 2435.

[78] Montrose Canal Co. v. Loutsenhizer Ditch Co., 23 Colo. 233, 48 Pac. 532; Handy Ditch Co. v. Southside Ditch Co. (Colo. Sup., 1899) 58 Pac. 30. But see Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278.

award him the priority to which he may be entitled.[79]

The limitation of four years set by the statute does not apply to an action to set aside a decree obtained by fraud. Such an action is not brought to determine the priority of appropriation of water, but is an action for relief on the ground of fraud, and if any statute of limitation is applicable, it is the statute providing that bills for relief on the ground of fraud shall be filed within three years after the discovery of the fraud.[80]

§ 105. Same—Some Observations on the Colorado System.

The Colorado system for the adjudication of water rights, considered in the preceding sections, is noteworthy as the first important attempt made by any state legislature to provide a special proceeding for the determination of controversies over water rights. It is further noteworthy for the reason that it has stood for twenty years without any change and with no material addition. This indicates the commendable thoroughness with which the persons who drafted these important statutes did their work, and the surprising forbearance of later legislatures in not tampering with the work of their predecessors. This exception to the general rule may well be contemplated with satisfaction by the legislature-burdened people of the western states, who have suffered so much from the deplorable zeal of their lawmakers to earn their salaries.

The statutes, however, might be improved in some respects. In the first place, the sections of the act of 1881 are arranged with a striking disregard of the first principles of logical or-

79 Greer v. Heiser, 16 Colo. 306, 26 Pac. 770.

80 Peck Lateral Ditch Co. v. Pella Irr. Ditch Co., 19 Colo. 222, 34 Pac. 988.

der. Thus, the provision requiring publication of the act, which would naturally come at the end, along with the repeal clause, appears as sections two and three. Again, the two sections prescribing the contents of the decree are separated by four sections. So, also, a special division of the act is devoted to proceedings before a referee, and yet, under the division "General Provisions," a section gives the right to complain of the conduct of the referee; while under the title "Appeals," provision is made for the removal of the referee, and also for his compensation. Other examples might be given.

The foregoing criticism is directed at the form of the act. But while its absurd arrangement offends the logical sense of every intelligent reader, it does not imperil the rights of the parties to the proceedings; and it is believed that the act furnishes ample protection to water rights as they exist at the time of the decree.

In determining water rights, the courts must, of course, be governed by the general laws of appropriation as applied to the existing facts. Every party must be awarded so much water as he may claim by virtue of a prior appropriation, and which he needs for the irrigation of the land for the benefit of which the appropriation was made. His right is measured by his need, as much as by any other consideration. The quantity of water needed to irrigate his land, as well as the other facts necessary to the establishment of his right, may be shown by the evidence. The adjudication is made upon the supposition that the facts so established remain unchanged, and hence that a decree correct as to the quantity of water awarded at the time the decree is entered will be correct for all future time.

This, however, is not the case. It is a well-known fact that more water is needed for the irrigation of arid land during the first year or so than after the soil has once become thoroughly saturated by repeated flooding. Moreover, the loss of water from irrigation ditches and canals by absorption and seepage is greater when such works are first constructed than after they have been for some time in use. Again, the amount of water needed will depend very largely upon the crop to be raised,—some crops requiring more water than others. Hence a decree awarding sufficient water to irrigate an appropriator's land, as determined by the crop then contemplated, may award him too much or too little water for another season, when a different crop is to be raised.

From the facts just stated it results that an irrigator may sometimes be entitled to claim under a decree a quantity of water far in excess of his needs, yet which was correctly defined at the time when the decree was rendered. He has a perfect right, under the decree, to use the water wastefully, or for the irrigation of land other than, and in addition to, that for which the water was appropriated, or may compel others to permit it to flow uselessly in the stream, when it is absolutely needed for the irrigation of their lands, unless they are willing and able to pay him for its use. This is wholly in derogation of the fundamental principles of the law of appropriation. It is true that this result is to some extent guarded against by the provisions for reopening the decree,[81] but this only partially overcomes the difficulty, and has not proven sufficient to prevent the occurrence of the anomalous condition above suggested. It is submitted that this

[81] See remarks of Hayt, C. J., in Louden Irr. Canal Co. v. Handy Ditch Co., 22 Colo. 102, 43 Pac. 535.

objection might be further overcome by giving to the water commissioners power, duly guarded, to apportion the water each season, not only according to the decreed priorities of each appropriator, but also according to his needs, within the limits set by the decree, for that particular season. The Colorado system is open to a further objection, in that it unnecessarily imposes a great burden upon the courts. The courts are to some extent relieved by their power to appoint a referee, but such appointment does not take from them the general supervision of the proceedings.

The objections here urged to the Colorado system seem to be satisfactorily overcome by the Wyoming system, to be considered in the next section.

§ 106. Statutory Adjudication—Wyoming System.

In 1886 the territorial legislature of Wyoming passed an act for the adjudication of water rights resembling that of Colorado, and a few adjudications were had under proceedings provided for by this act.[82] This act has been since repealed, and an entirely new system of adjudication provided by the act of December 22, 1890, since amended in some particulars.[83] This act, together with the other statutory provisions for the regulation of the use of water throughout the state, forms perhaps the most satisfactory system yet provided by any state. The system differs from that of other states in that the state does not necessarily wait for controversies over water rights to arise, and application for the adjudication of such rights to be made by a claimant or claimants, but of its own motion institutes proceedings, and de-

[82] See Rev. St. Wyo. 1887, §§ 1331-1361.

[83] The act of 1890 and its amendments comprise sections 859 to 887 of the Revised Statutes of 1899.

termines the priorities and rights of all the appropriators.

The main features of the system are as follows: The power to determine priorities is vested in the board of control.[84] The statute requires the board, at its first meeting, to make proper arrangements for beginning the determination of the priorities of right to the use of the public waters of the state, such determination to begin on the streams most used for irrigation, and be continued as rapidly as practicable, until all the claims for appropriation on record shall have been adjudicated. The board was required to decide, at its first meeting, the streams to be first adjudicated, and fix a time for beginning to take testimony, and to make such examinations as will enable them to determine the rights of the various claimants.

Notices giving the date when the engineer will begin a measurement of the stream to be adjudicated, and the ditches diverting water therefrom, the time and place when the superintendent of the division in which the stream is situated will begin taking testimony as to the rights of parties claiming water from the stream, are required to be published, and copies sent by registered mail to each party having a recorded claim to the waters of the stream. Accompanying the notice, a blank form is required to be sent to the claimant, on which the claimant is required to present in writing, under oath, certain specified facts relating to his appropriation. The superintendent, or, if he is interested in the water of the stream of his division, the superintendent of the next nearest division, or the state engineer, shall take the testimony at the time and place specified, and upon the completion of the testimony it is required to be opened to the inspection of the

84 As to the board of control, see post, § 122.

various claimants at a time and place mentioned in a notice thereof, to be published and sent by mail to the claimants. An opportunity is provided for any interested party to contest, before the superintendent and the board, the claim of any other persons who may have submitted evidence to the superintendent.

Upon the completion of the evidence in the original hearing and in all contests, the superintendent is required to transmit the same to the board. In the meantime, the engineer or his assistant is required to make an examination and measurement of the stream and the works diverting water therefrom, as well as of the irrigated lands, or lands susceptible of irrigation from the various ditches and canals taking water from the stream, which observations and measurements shall be reduced to writing and recorded in his office, and he shall also make a map or plat showing the course of the stream, the location of each ditch or canal, and the legal subdivisions of lands which have been irrigated or are susceptible of irrigation therefrom.

"At the first regular meeting of the board of control after the completion of such measurement by the state engineer, and the return of said evidence by said division superintendent, it shall be the duty of the board of control to make, and cause to be entered of record in its office, an order determining and establishing the several priorities of right to the use of waters of said stream, and the amounts of appropriations of the several persons claiming water from such stream, and the character and kind of use for which said appropriation shall be found to have been made. Each appropriation shall be determined in its priority and amount by the time by which it shall have been made, and the amount of water which shall have been applied for beneficial purposes. Pro-

vided, that such appropriator shall at no time be entitled to the use of more water than he can make a beneficial application of on the lands for the benefit of which the appropriation may have been secured, and the amount of any appropriation made by reason of an enlargement of distributing works shall be determined in like manner. Provided, that no allotment shall exceed one cubic foot per second for each seventy acres of land for which said appropriation shall be made."

As soon as practicable after the determination of the priorities of appropriation of the use of waters of any stream, the secretary of the board of control is required to issue to each person, association or corporation represented in such determination, a certificate signed by the state engineer as president of the board, and attested under seal by the secretary, setting forth the name and postoffice address of the appropriator, the priority number of the appropriation, the amount of water appropriated, and, if the appropriation be for irrigation, a description of the legal subdivisions of land to which the water is to be applied. Said certificate must be transmitted by the state engineer, or by a member of the board in person, or by registered mail, to the county clerk of the county in which the appropriation shall have been made, and it is the duty of the county clerk, upon receipt of a recording fee of seventy-five cents, to record the certificate in a book specially prepared and kept for that purpose, and to immediately transmit the certificate to the appropriator. Provision is made for an appeal, by any party feeling himself aggrieved, from the decision of the board of control to the district court, and from that court to the supreme court.[85]

[85] See, as to appeals, Daley v. Anderson (Wyo., 1897) 48 Pac. 839.

Provision is also made for a rehearing before the board of control.

The Wyoming act has been discussed at length in a recent case, in which several questions were raised and determined.[86] The constitutionality of the act was assailed on the ground that it was in conflict with section 24 of article 3 of the constitution, providing that "no bill * * * shall be passed containing more than one subject, which shall be clearly expressed in its title," in so far as it confers upon the board of control authority to determine priorities. The act was entitled, "An act providing for the supervision and use of the waters of the state," and included a general scheme of government by the board of control, besides the system of adjudication now being considered. It was argued that the provisions for adjudication of water rights are not included in the word "supervision," employed in the title, and that in this respect the act is broader than the title, and contains more than one subject. The act was held valid, as against this objection. Another ground urged against the validity of the act was that, in authorizing the board of control to adjudicate priorities as provided, it conferred judicial power upon the board, in violation of the provision of the constitution (article 5, § 1) vesting the judicial power in certain specified courts. The court held that the act was not unconstitutional on this ground, since the duties of the board were primarily administrative, rather than judicial, in character.

It was further held that the act is retroactive, no distinction being made between claimants whose rights accrued prior to, and those acquiring rights after, the adoption of the constitution and the statute, and the same duty to submit

[86] Farm Inv. Co. v. Carpenter (Wyo., 1900) 61 Pac. 258.

proofs being imposed on all parties claiming a right to the use of water by priority of appropriation, without regard to whether such right was acquired before or after the statute was passed. On the question of the effect of the failure of a claimant to submit his proofs, it was held that, as to such claimant failing to participate in the adjudication proceedings, the decree of the board of control is not res judicata of his undetermined rights, since the awarding of priorities to some claimants does not ipso facto amount to a denial of nor depend upon the negation of the rights of others, and hence he is at liberty, notwithstanding his failure to submit his proofs, to assert and maintain his rights in the courts, the jurisdiction of which remains as ample and complete after as before an adjudication by the board. It was held, finally, that the service of notice of proceedings by registered mail, prescribed by the statute, is a sufficient service to constitute due process of law.

§ 107. Statutory Adjudication—Washington, Nebraska, Montana, Utah, and Oregon.

The statutory provisions of Colorado and Wyoming, considered in the preceding sections, constitute the most complete systems for the adjudication of water rights to be found in the arid region. In several other states, however, the matter has received attention from the legislatures.

In Washington, the Colorado system has been adopted in part, though the statute makes no provision for proceedings before a referee, or for review and rearguments, or for an appeal.[87]

[87] Codes & Statutes 1897, §§ 4158-4164. These sections are practically verbatim copies of Mills' Ann. St. Colo. §§ 2400, 2403-2408, respectively.

In Nebraska, the Wyoming system has been adopted, the adjudication of priorities being made the duty of the state board of irrigation.[88]

The statutes of Montana[89] and Utah[90] contain a single provision on the subject of the adjudication of water rights, which is as follows: "In any action hereafter commenced for the protection of rights acquired to water under the laws of this state, the plaintiff may make any or all persons who have diverted water from the same stream or source parties to such action, and the court may, in one judgment, settle the relative priorities and rights of all the parties to such action. When damages are claimed for the wrongful diversion of water in any such action, the same may be assessed and apportioned by the jury in their verdicts [or by a court, if the case be tried without a jury],[91] and judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and may determine the ultimate rights of the parties between themselves. In any action concerning joint water rights, or joint rights in water ditches, unless partition of the same is asked by parties to the action, the court shall hear and determine such controversy as if the same were several as well as joint."

This provision contemplates an equitable action, in which the court may settle in one decree the priorities and rights of all the parties to the water or the use thereof, and when damages are claimed in such action for the wrongful diversion of water, the same may be assessed and apportioned. The

88 Comp. St. 1899, §§ 5459, 5460, 5462-5470.

89 Civ. Code 1895, § 1891.

90 Rev. St. 1898, § 1274.

91 Words inclosed in [] found in Utah statute only.

statute does not apply to an action at law for damages to crops caused by the wrongful joint diversion of water by several defendants, where there is nothing in the complaint or evidence to authorize the granting of equitable relief.[92]

A statute somewhat similar to that just quoted is found in Oregon.[93]

[92] Miles v. Du Bey, 15 Mont. 340, 39 Pac. 313.

[93] Hills' Ann. Laws 1892, p. 1940, § 24. See statute in Appendix.

CHAPTER X.

ACTIONS FOR INTERFERENCE WITH WATER RIGHTS.

§ 108. Generally.
109. Action for Diversion of Water—Generally.
110. Same—Who may Maintain Action.
111. Same—Joinder of Actions and Parties.
112. Same—Independent Diversions by Several Defendants.
113. Same—Plaintiff's Rights must be Invaded—Proof of Damages.
114. Same—Jurisdiction of a Court of Equity.
115. Same—Pleading.
116. Action to Quiet Title.
117. Pollution of Water.

§ 108. Generally.

A person who has a right to the use of water for irrigation is of course entitled to the same protection for his water right as for any other of his legal rights, and when such right is interfered with, he may maintain an action for damages or for an injunction restraining the commission or continuance of the injury.

The water right may be interfered with either by an injury to the ditch, whereby its capacity to convey water is impaired, or by a pollution of the water, so that it is rendered unfit for irrigation purposes, or, as is usually the case, by an unlawful diversion of the water, so that parties having a prior right thereto are deprived of some or all of the water to which they are entitled. Causes of action for the interference with water rights do not differ in kind from other civil actions for tort, and are subject to the rules of pleading and practice common to such actions generally.

§ 109. Action for Diversion of Water—Generally.

A person entitled to the flow or use of a certain quantity of water for irrigation purposes may maintain an action for damages or for an injunction against any one unlawfully diverting the water to his prejudice.[1] This is, of course, true, whether he claims the water as a riparian proprietor or as a prior appropriator, but there are some important distinctions, bearing on the right to maintain the action, to be made between the two cases, growing out of the fundamental difference between the right to water as an incident to riparian ownership, and such right based upon priority of appropriation. To sustain an action for the diversion of water, it must, of course, appear in either case that the diversion complained of has been in prejudice of the plaintiff's superior right. Not every diversion is unlawful, but a diversion that might be unlawful where the plaintiff claims the water as a riparian owner need not necessarily be so where the plaintiff's right is based upon prior appropriation. This is plain when we recall that the riparian proprietor is entitled to the entire flow of the stream, except so far as it may be diminished by the lawful use of upper proprietors, whether he uses or needs it or not; but a prior appropriator has no right whatever to the flow of the water as such, and may claim only so much of the water as he has appropriated and actually uses or needs for the proper irrigation of his land.

From this it follows that a riparian proprietor may maintain an action for any diversion of the water of the stream which diminishes the flow of water to which he is entitled,

[1] Ellis v. Tone, 58 Cal. 289. See cases cited throughout this chapter.

and may recover nominal damages, although he has suffered no actual injury; and he will be entitled to an injunction restraining the continuance of such diversion, although no actual injury be threatened. The mere diversion of the water is an infringement of his rights. But a prior appropriator cannot recover damages for a past diversion unless he has been actually injured thereby; nor may he enjoin the continuance of such diversion unless an actual injury be threatened. The mere diversion, without actual or threatened injury, is no infringement of his rights.[2]

A prior appropriator, unless he can show that he is entitled to all the water of a natural stream, cannot, in the nature of things, identify certain specific water as belonging to himself, while it is running in its natural channel; and so long as he is able to secure the full amount of water to which he is entitled, he cannot complain that other persons are diverting the water.[3] But where an irrigator is entitled to all the water of a stream, any diversion of the water thereof is, of course, wrongful, and may be enjoined; and in order to support a judgment in the plaintiff's favor in such case, a specific finding that the diversion was wrongful and without right is not necessary.[4]

In estimating the damages in an action for the wrongful diversion of water, the real injury wrought, rather than the period of time during which the plaintiff was deprived of the water, is to be taken as the measure of damages.[5]

The fact that the water was not diverted directly from the

[2] See post, § 113.

[3] Saint v. Guerrerio, 17 Colo. 448, 30 Pac. 335.

[4] Williams v. Harter, 121 Cal. 47, 53 Pac. 405.

[5] Carron v. Wood, 10 Mont. 500, 26 Pac. 388.

stream by means of ditches tapping it does not prevent the maintenance of an action for depriving the plaintiff of water to which he is entitled. Thus, an action may be maintained to abate ditches or wells dug so near the stream from which the plaintiff derives his supply of water as to withdraw some of the water therefrom by percolation.[6]

It may sometimes be a question as to what is the proper county in which to bring an action for the diversion of water, where the residence of the parties, or their respective properties, are in different counties. In this connection it should be noted that the cause of action for an interference with a water right acquired by prior appropriation, by the unlawful diversion of the water, consists not only in the wrongful diversion of the water, but also in the consequent injury to the prior appropriator. Neither the diversion alone, nor the injury alone is sufficient to constitute a cause of action against the person diverting the water. The mere diversion of water gives the prior appropriator no right to complain so long as he receives all the water to which he is entitled. Likewise as to the injury, unless it be shown that it was caused by the diversion in question. The diversion of the water and the consequent injury constitute one cause of action. From this it follows that the cause of action may arise in two different counties, as where the defendant in one county diverts water to which the plaintiff is entitled for the irrigation of his land lying in another county. In such case, the plaintiff may elect in which county he will bring

6 Platt Val. Irr. Co. v. Buckers Irr., Mill. & Imp. Co., 25 Colo. 77, 53 Pac. 334; McClellan v. Hurdle, 3 Colo. App. 430, 33 Pac. 280. See also, Herriman Irr. Co. v. Butterfield Min. & Mill. Co., 19 Utah, 453, 57 Pac. 537.

his action.[7] Similarly, where the plaintiff's irrigating ditch is located in two counties,—the head of the ditch being in one county, and the land to be irrigated lying in the other county,—a cause of action for diverting the water from the stream above the head of the plaintiff's ditch arises in both counties, and the action for such diversion may therefore be brought in either county.[8]

In an action for the diversion of water, it is of course a good defense that the defendant has a right to the water either as legal owner or otherwise.[9] But an allegation in the answer that the defendant is the owner of a tract of land through which the stream flows, and that most of such tract is susceptible of and would be benefited by irrigation, without any allegation that he is entitled, as a riparian owner, to any definite quantity of water for the irrigation of his riparian land, or as to what proportion of the waters of the stream he could reasonably exhaust for that purpose, or whether his land is above or below the point of the plaintiff's diversion, is insufficient to raise any issue as to the extent of the defendant's right, as a mere riparian proprietor, to divert and exhaust any portion of the waters of the stream; and a finding in accordance with such allegation does not conflict with a general finding in favor of the plaintiff, as the owner of the water decreed to him.[10] So, also, a cross-complaint by the defendant claiming riparian rights in the water of the stream in question, which does not show, by statement of facts, that the defendant owns or holds by right any lands

[7] Deseret Irr. Co. v. McIntyre, 16 Utah, 398, 52 Pac. 628.

[8] Lower Kings River Water Ditch Co. v. Kings River & F. Canal Co., 60 Cal. 408.

[9] Posachane Water Co. v. Standart, 97 Cal. 476, 32 Pac. 532.

[10] Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. 889.

which are riparian to such stream, does not state a cause of action for a cross-complaint.[11]

Where, in an action for the diversion of water, the plaintiff makes out a prima facie case as to his right to the water, the burden is cast upon the defendant to show that he was the owner of the water diverted by him, and had a right to divert it, and did not divert more than belonged to him. Thus, where the defendant claims that the water diverted had been previously turned into the stream by him, he has the burden of showing that he has not diverted any more water from the stream than he has turned into it, and that the diversion has not diminished the quantity of water previously appropriated by the plaintiff.[12]

We have seen that the right acquired by prior appropriation is wholly independent of the needs of later appropriators, and hence, where a party has acquired a priority of right to water by a valid appropriation thereof, another party cannot

[11] Silver Creek & Panoche Land & Water Co. v. Hayes, 113 Cal. 142, 45 Pac. 191. In this case, the defendant in his cross complaint averred that he owned three lots, and had possession and control of three other lots, and that the stream flowed "through the natural channel thereof over and across the lands of defendant, as aforesaid," but did not aver that it flowed over the lots owned by him, or that he had possession and control of the other lots by right. The presumption being that he had made his allegation as strong as he could make it, it was held that it must be presumed that he had taken possession of these three other lots without right, and that the water flowed only over these lots in which he had no right; and, further, that although a trespasser on public lands is for some purposes deemed the owner, yet, when one asserts riparian rights as against an upper appropriator of water, he must show some right, inchoate or otherwise, to the land.

[12] Herriman Irr. Co. v. Butterfield Min. & Mill Co., 19 Utah, 453, 57 Pac. 537. See ante, § 43.

justify an interference with such right by merely showing that he is wholly dependent upon the same supply of water.[13]

An action for the diversion of water cannot be maintained by one who consented to such diversion; such consent being a complete defense to the action.[14] And since no riparian rights can be claimed in an artificial stream, it is a good defense to an action for the diversion of water by one claiming a right thereto as a riparian proprietor to show that the stream in question is an artificial, and not a natural, watercourse.[15] So, also, an action for an injunction restraining the obstruction of the flow of a stream cannot be maintained where it appears that there was no obstruction.[16]

It will ordinarily be a good defense, of course, that the diversion complained of was not made by the defendant. Thus it has been held that the owner of riparian land, who has leased it to a tenant, the latter having exclusive control of the premises, water flumes, etc., is not liable for the unlawful diversion by the tenant of more water than he was entitled to, the lessor having had nothing to do with such diversion.[17]

An action for the wrongful diversion of water may be barred by the statute of limitations, and adverse possession by the defendant for the period of limitations is therefore a good defense to the action.[18]

13 Roberts v. Arthur, 15 Colo. 456, 24 Pac. 922. But see this case to the effect that an allegation of such dependence may sometimes be proper in an equitable proceeding. See, also, Barrows v. Fox, (Cal., 1892) 30 Pac. 768.

14 Churchill v. Baumann, 95 Cal. 541, 30 Pac. 770, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43. See Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

15 See Sampson v. Hoddinott, 1 C. B. (N. S.) 590, 87 E. C. L. 590; Green v. Carotta, 72 Cal. 267, 13 Pac. 685.

16 Sparlin v. Gotcher, 23 Ore. 186, 31 Pac. 399.

17 Gould v. Stafford, 101 Cal. 32, 35 Pac. 429.

18 Evans v. Ross (Cal. 1885) 8 Pac. 88. See ante, §§ 88-93.

§ 110. Same—Who may Maintain Action.

It is obvious that an action for the diversion of water can be maintained only by one who owns the water right, or has such an interest therein as can be invaded. A judgment for damages in such case can be based only upon the ownership or right of property in the water, and the wrongful invasion of that right. Therefore, if, in an action for the diversion of water, both parties claim the ownership of the water right, the question of ownership must first be determined before any judgment for damages can stand.[19] It is not necessary that the plaintiff should be the owner of the ditch by which the water is supplied, but it is sufficient if he has a right to the use of the water. Thus, the owner of lands irrigated by means of a ditch owned by another may enjoin the wrongful diversion of water above him to his injury.[20] Again, the plaintiff need not be the owner of the land if he has the right of occupation and to the use of the water thereon. Thus, a tenant for years many enjoin the unlawful diversion of water from a stream flowing by the leased premises, though, in effect, the injunction, though perpetual, will cease to exist with the termination of the lease.[21] In such case, also, the owner of the leased premises may maintain an action for the unlawful diversion, such diversion, at least where the doctrine of riparian rights obtains, being an injury done to the inheritance.[22] A person in

19 Cash v. Thornton, 3 Colo. App. 475, 34 Pac. 268.

20 Clifford v. Larrien (Ariz. 1886) 11 Pac. 397.

21 Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535; Heilbron v. Kings River & F. Canal Co., 76 Cal. 11, 17 Pac. 933; Crook v. Hewitt, 4 Wash. 749, 31 Pac. 28.

22 Heilbron v. Last Chance Water Ditch Co., 75 Cal. 117, 17 Pac. 65.

possession of land as a pre-emptor, who holds a receiver's receipt for payment therefor, which is made by statute prima facie evidence of rightful possession, may, as a riparian proprietor, restrain the unlawful diversion of water by an upper proprietor.[23] An action for the diversion of water may be maintained by a city which has acquired the water right from the original appropriators.[24]

The assignee of a water right may maintain an action thereon, although the assignment was made for the express purpose of enabling him to bring the action. Thus it has been held that one to whom certain lands were granted for the purpose of bringing an action for water rights connected therewith, with an oral agreement that upon the termination of the litigation the lands should be reconveyed, might maintain the action in his own name, such action being founded on the legal title.[25]

§ 111. Same—Joinder of Actions and Parties.

It is the common practice to join an action to recover damages for the diversion of water and a cause of action to obtain an injunction to restrain the continuance of the diversion.[26] But where there are several plaintiffs, causes of action which are several cannot be joined with causes of action which are common. Thus, where several persons own

[23] Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. 399.

[24] Springville v. Fullmer, 7 Utah, 450, 27 Pac. 577.

[25] Smith v. Logan, 18 Nev. 149, 1 Pac. 678.

[26] See cases cited throughout this chapter. An action to recover damages for the diversion and pollution of a stream of water, and an action to obtain an injunction restraining the further diversion and pollution thereof, may be properly joined. Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. 432. See, also, Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119.

separate tracts of land in severalty, they cannot join a cause of action for damages caused to their respective tracts by the diversion of water by the defendant with a cause of action for an injunction restraining the future diversion of the water. In such case, the cause of action to obtain an injunction is common to all the plaintiffs, but the cause of action for damages is several as to each plaintiff, and hence the two causes of action are improperly joined.[27] There is, of course, also a misjoinder of parties plaintiff in such case, in that they seek a joint recovery of damages in which they have no joint interest. But the several plaintiffs may join in the common action for an injunction.[28] Tenants in common of water rights may join in an action to restrain the interference with their common right.[29] It is not necessary that they should join, however, for each cotenant may bring an action enjoining the diversion of any of the water by a stranger.[30]

A joint action for damages cannot be maintained against two or more defendants, where the acts complained of were not done by them acting jointly, but each diverted the water independently of all the others.[31] But such persons may be

27 Barham v. Hostetter, 67 Cal. 274, 7 Pac. 689; Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94.

28 Churchill v. Lauer, 84 Cal. 233, 24 Pac. 107; Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94; Ronnow v. Delmue, 23 Nev. 29, 41 Pac. 1074.

29 Smith v. Stearns Rancho Co. (Cal., 1900) 61 Pac. 662.

30 Union Mill & Min. Co. v. Dangberg, 81 Fed. 73; Rodgers v. Pitt, 89 Fed. 420; Lytle Creek Water Co. v. Perdew, 65 Cal. 447, 4 Pac. 426.

31 Evans v. Ross (Cal. 1885) 8 Pac. 88; Miles v. Du Bey, 15 Mont. 340, 39 Pac. 313. See, contra, Hillman v. Newington, 57 Cal. 56, in which, however, the main purpose of the action was to obtain an injunction, only nominal damages being awarded. See, also, Saint v. Guerrerio, 17 Colo. 448, 30 Pac. 335.

joined as defendants in a suit in equity for an injunction.[32] And where the defendants jointly committed the acts complained of, or the diversion was made by one for the benefit of all, they are, of course, jointly liable, and should be joined as defendants.[33] The principles here stated have been applied to actions other than for the diversion of water, it being held that several tort feasors, acting severally, and not jointly, may be jointly restrained from the continuance of the injury, but are not jointly liable in damages.[34]

§ 112. Same—Independent Diversions by Several Defendants.

Several persons may divert the water of a stream, so that the aggregate effect of their several diversions is to deprive a prior appropriator of some or all of the water to which he is entitled, although no single diversion alone would have this effect. In such case, the prior appropriator can have no separate action against any one of such persons, for the latter, acting alone, has done him no wrong. But he is not without remedy. He may, and, in order to obtain redress, he must, bring a joint action against all of such persons whose appropriations are junior to his own to recover damages for the diversion, and to restrain a continuance thereof, leaving the parties defendant in such case to settle their respec-

[32] Union Mill & Min. Co. v. Dangberg, 81 Fed. 75.

[33] Hulsman v. Todd, 96 Cal. 228, 31 Pac. 39. See, also, Bowman v. Bowman (Ore., 1899) 57 Pac. 546.

Where it appears from the allegations of the answer that the defendants acted jointly in diverting the water, a special finding that they are jointly liable and jointly committed the acts complained of is not necessary to sustain a judgment against them jointly for damages. Williams v. Harter, 121 Cal. 47, 53 Pac. 705.

[34] Miller v. Highland Ditch Co, 87 Cal. 430, 25 Pac. 550; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523.

tive priorities among themselves.[35] And it has been held that the payment of the damages and costs recovered should be apportioned equally among the defendants.[36] But all the parties whose joint acts operate to deprive the prior appropriator of the water to which he is entitled should be

35 Hillman v. Newington, 57 Cal. 56; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. 335. In this case Elliott, J., said: "To illustrate: Let us suppose that the natural flow of water in the * * * creek is only 200 inches, and that plaintiff, as the prior appropriator, is entitled to 100 inches thereof. Mansfield, owning lands on said stream above plaintiff, diverts 100 inches of the water. Saint, next below Mansfield, but still above plaintiff, diverts another 100 inches. Thus it results that plaintiff is wholly deprived of the use of the water, though he is the actual prior appropriator thereof. To obtain redress, plaintiff commences his action by injunction against Mansfield. The action is resisted; Mansfield shows that he leaves water enough in the natural stream for plaintiff, and thus plaintiff is defeated, unless he assumes the burden of proving that Mansfield's appropriation is junior to Saint's,—a matter in which plaintiff has no interest. The same result follows if Saint be sued separately; and thus the party actually having the better right is prevented from maintaining it. To prevent a failure of justice in cases of this kind, the prior appropriator cannot properly be required to assume any such risks or burdens. But he may bring and maintain an action jointly against all parties, junior in right to himself, whenever the result of their acts, either joint or several, deprives him of his better right to the use of the water, or substantially interferes therewith. He may thus secure protection to his own priority, and leave the junior appropriators to settle their relative priorities among themselves."

36 Hillman v. Newington, 57 Cal. 56. This case, in so far as it holds that a joint action for damages may be maintained against several persons severally diverting water, is undoubtedly wrong (see ante, § 111); but the damages awarded in the case were merely nominal, the main purpose of the action being to obtain an injunction. The real decision, that a joint action might be maintained to obtain an injunction, and that the costs should be divided, is in accordance with the weight of authority.

joined as defendants; and where, in an action brought to restrain the defendants from obstructing the flow of a stream to the plaintiff's ditch, it appears that during the period complained of other persons, not parties to the action, have diverted water from the same stream to such an extent that it cannot be sufficiently shown that, but for the acts of such persons, no injury would have resulted to the plaintiff, an injunction will not be granted.[37]

But where the diversion of water by one person is unlawful of itself, irrespectively of any diversion by other parties, as it would be where one person diverts water to such an extent as to deprive a prior appropriator of some of the water to which he is entitled, and other diversions would simply increase the extent to which the prior appropriator is injured, or where a riparian owner diverts more water than he may claim as against the plaintiff, it is no defense, in an action for such unlawful diversion, that other persons were also unlawfully diverting the water, and it is therefore not error to exclude evidence of such diversion by other persons.[38] Such evidence is admissible only on the issue as to the amount of damages, and if the plaintiff waives all claim to damages except nominal damages, it is not admissible at all.[39]

§ 113. Same—Plaintiff's Rights must be Invaded—Proof of Damages.

In order to entitle the claimant of a water right to an in-

[37] West Point Irr. Co. v. Moroni & Mt. P. Irr. Ditch Co. (Utah, 1900) 61 Pac. 16.

[38] Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76; Heilbron v. Kings River & F. Canal Co., 76 Cal. 11, 17 Pac. 933.

[39] Gould v. Stafford, 77 Cal. 66, 18 Pac. 879.

junction or damages in an action for an alleged interference with his right, it must, of course, appear that his right has been invaded. And an injunction will not be granted in such an action to restrain the defendant from diverting the water of the stream in question, where it appears that the water diverted would not have reached the plaintiff's land even if the defendant had permitted it to continue to flow in its natural channel.[40] Similarly, where an injunction, issued at the suit of the defendant, restraining the plaintiff from using the water of a certain ditch, was dissolved, it was held, in an action on the injunction bond to recover damages for loss of the plaintiff's crops by reason of the issuing of the injunction, that a judgment in favor of the plaintiff for nominal damages would not be disturbed on writ of error by the plaintiff, where the evidence showed that there was a great scarcity of water, so that it could not have reached the plaintiff's land.[41]

But although there must be an actual or threatened invasion of the plaintiff's rights to entitle him to maintain an action for the diversion of water, it is not necessary in all cases that there should be an actual or threatened injury and consequent damages. As stated in a previous section, a riparian proprietor, as such, may maintain an action for any diversion of the water of the stream which diminishes the

[40] Larimer & Weld Reservoir Co. v. Cache La Poudre Irr. Co., 8 Colo. App. 237, 45 Pac. 525, affirmed in 25 Colo. 144, 53 Pac. 318. Leonard v. Shatzer, 11 Mont. 422, 28 Pac. 457; Raymond v. Wimsette, 12 Mont. 551, 31 Pac. 537; West Point Irr. Co. v. Moroni & Mt. P. Irr. Ditch Co. (Utah, 1900) 61 Pac. 16.

[41] Mack v. Jackson, 9 Colo. 536, 13 Pac. 542. It was further held in this case that, if the plaintiff could have obtained sufficient water from some other source, he could not recover a greater sum than he would have had to expend in so doing.

flow of water to which he is entitled, and may recover nominal damages, or enjoin such diversion, although there be no actual or threatened injury. But a prior appropriator may recover damages or enjoin the diversion only in case of actual or threatened injury.[42]

On these principles, it is held that one riparian proprietor may maintain an action on the case against another, and recover nominal damages for an unlawful diversion of water, constituting an invasion of the riparian rights of the plaintiff, without proof of actual present damages.[43] In such case it is sufficient for the plaintiff to show an obstruction of his right, and such obstruction being shown, the law will infer damage.[44] But where, even in the case of a riparian proprietor, there can be no invasion of the plaintiff's right without actual perceptible damage, no action can be maintained for the diversion without proof of such damage.[45]

An action for an injunction to restrain the wrongful diversion of water may be maintained by the person having a right to the water as a riparian owner or otherwise, without proof of actual past damages,[46] though undoubtedly, where

[42] See ante, § 109.

[43] Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504; Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85.

[44] Sampson v. Hoddinott, 1 C. B. (N. S.) 590, 87 E. C. L. 590. So, also, in an action for an injunction. Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147.

[45] Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85. See Embrey v. Owen, 6 Exch. 353; Heilbron v. 76 Land & Water Co., 80 Cal. 189, 22 Pac. 62; Modoc Land & Live Stock Co. v. Booth, 102 Cal. 151, 36 Pac. 431.

[46] Moore v. Clear Lake Water Works, 68 Cal. 146, 8 Pac. 816; Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. 399; Spargur v. Heard, 90 Cal. 221, 27 Pac. 198; Mott v. Ewing, 90 Cal. 231, 27 Pac.

the plaintiff claims as a prior appropriator, there must be proof of threatened injury. In general, where there can be no invasion of the plaintiff's rights by the defendant's diversion of the water without actual damage, before the plaintiff can enjoin the defendant from diverting the water, he must show that he will be damaged by such diversion.[47] In accordance with these principles, it has been held that the right of a riparian proprietor to an injunction restraining the diversion of the water of the stream by one who is not a riparian owner does not depend upon the amount of injury which he has received. As a riparian proprietor, he is entitled to the entire flow of the stream, as against any diminution thereof by one not a riparian owner, and the claim of the latter of a right to divert a portion of the water authorizes the riparian proprietor to invoke the aid of a court of equity to prevent such claim from ripening into a right.[48] But a prior appropriator of water is not entitled to an injunction restraining the diversion of water, where it appears that he will be only nominally damaged by the acts done and threatened by the defendant. Thus, where a landowner diverts water for the irrigation of his land, but fails to use it for this purpose, and allows it to run to waste, he cannot enjoin another from turning the water away from his headgate, to be used by the defendant on his own land.[49] But the fact that the injury is incapable of ascertainment, or of being com-

194; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577; Brown v. Ashley, 16 Nev. 311; Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147.

47 Cruse v. McCauley, 96 Fed. 369.

48 Gould v. Eaton, 117 Cal. 539, 49 Pac. 577. But see Modoc Land & Live Stock Co. v. Booth, 102 Cal. 151, 36 Pac. 431.

49 Peregoy v. McKissick, 79 Cal. 572, 21 Pac. 967.

puted in damages, and therefore only nominal damages can be awarded, will not deprive a riparian proprietor of a right to an injunction restraining the unlawful diversion of the water of the stream flowing past his land.[50]

§ 114. Same—Jurisdiction of a Court of Equity.

A court of equity, in a proper case, will grant an injunction restraining the unlawful diversion of water.[51] And the plaintiff is not required to establish his right at law by recovering a judgment in damages before applying for an injunction. He must, indeed, clearly make out his right in equity, and show that money damages will not give him adequate compensation. But if he proves his case, relief will be granted, although he has not demanded damages at law. Where the unlawful diversion is a continuing one, or future diversions are threatened, the remedy at law is plainly inadequate, and a resort to a court of equity is necessary and proper in order to obtain complete relief.[52] And where an injunction against the threatened diversion is asked for,

50 Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535.

51 United States Freehold Land & Emigration Co. v. Gallegos, 89 Fed. 769; Johnson v. Superior Court, 65 Cal. 567, 4 Pac. 576; Barrows v. Fox, 98 Cal. 63, 32 Pac. 811; Salazar v. Smart, 12 Mont. 395, 30 Pac. 676; Brown v. Ashley, 16 Nev. 311; Jerrett v. Mahan, 20 Nev. 89, 17 Pac. 12; Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147. See Stein Canal Co. v. Kern Island Irr. Canal Co., 53 Cal. 563; Bliss v. Johnson, 76 Cal. 597, 16 Pac. 542, 18 Pac. 785; McPhail v. Forney, 4 Wyo. 556, 35 Pac. 773.

52 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147. It should be noted that an action at law of ejectment will not lie to recover possession of a watercourse considered apart from the land, and hence a suit in equity becomes necessary to obtain relief. Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561.

the fact that the diversion has already actually begun will not prevent the granting of an injunction restraining the continuance of such diversion.[53] And it has been held that a court of equity will not interfere to prevent an interference with a water right, where there has been no overt hostile act on the part of the person complained of,—a mere intent, not acted upon, is not actionable.[54]

A court of equity may not only enjoin the unlawful diversion of water, but may also require the removal of the obstructions by which the diversion is made, in order that the water may flow undisturbed in the stream.[55]

In an equitable action to enjoin the unlawful diversion of water, and to abate the defendant's dam as a nuisance, and also to recover damages for the past diversion, the plaintiff is not entitled to a jury.[56] But in such case the court may call a jury, and direct proper issues to be framed and submitted to it. The verdict of the jury on these issues, however, is advisory only, and the court may adopt or reject it, and itself find the facts.[57]

§ 115. Same—Pleading.

The ordinary rules of pleading apply to actions for the unlawful diversion of water. Possibly a high standard of technical accuracy in the preparation of pleadings in irrigation cases should not be required, lest the products of the soil be

53 Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. 399.

54 Umatilla Irr. Co. v. Umatilla Imp. Co., 22 Ore. 366, 30 Pac. 30.

55 Johnson v. Superior Court, 65 Cal. 567, 4 Pac. 576.

56 Evans v. Ross (Cal., 1885) 8 Pac. 88; Churchill v. Baumann, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43.

57 Evans v. Ross (Cal., 1885) 8 Pac. 88; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. 335.

destroyed while time is wasted on mere matters of form. A plain statement of the substantial facts should be held sufficient.[58]

In order to entitle the plaintiff to the relief sought, he must show in his complaint that he has a prior right to the water, and that the defendant has unlawfully deprived him of it.[59] A statement of mere legal conclusions in a complaint is, of course, insufficient. Where the plaintiff claims a superior right by virtue of a prior appropriation, it is not sufficient to allege a priority of appropriation without setting forth the facts upon which such claim is based, for this would be merely to plead a conclusion of law. The complaint should contain every essential averment necessary to show the existence of such right under the law of appropriation.[60] A complaint in which the plaintiff alleges that he is the owner of certain land, requiring water for irrigation, and that he has actually diverted, and up to the time of the alleged unlawful diversion by the defendant, has actually used, all the water in question upon his land, is sufficient to show the plaintiff's right.[61]

[58] Per Elliott, J., in Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028.

[59] Downing v. Agricultural Ditch Co., 20 Colo. 546, 39 Pac. 336.

[60] Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028; Downing v. Agricultural Ditch Co., 20 Colo. 546, 39 Pac. 336; Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 3 Colo. App. 255, 32 Pac. 722. In this case the court held that, in an action by a ditch company on behalf of itself and its stockholders to restrain the diversion of water, the complaint should state the names of the users from the plaintiff's ditch, the date of their appropriations, and other facts relating to their individual appropriations. This ruling was reversed in 22 Colo. 513, 45 Pac. 444.

[61] Salazar v. Smart, 12 Mont. 395, 30 Pac. 676. Where, in a suit

Where the plaintiff alleges in his complaint that he has a right to the water, an allegation that he is in a position to use it himself or furnish it to others is unnecessary.[62]

Where the plaintiff claims a prescriptive right to the use of the water, he must, of course, allege facts showing the existence of such right. An allegation that he has, for the prescriptive period before the diversion complained of, "had the undisputed usufructuary right to the use of the water," is not sufficient, for such use is not necessarily adverse.[63]

In an action for an injunction to restrain the unlawful diversion of water, it must be alleged in the complaint that the diversion is continuing, and that the defendant threatens to continue it.[64] A bill disclosing a continuing trespass on the complainant's lands by a number of defendants, and a constant and wrongful diversion of water by them from a stream flowing through complainant's lands, which is continually depreciating their value, was held sufficient to entitle the complainant to an injunction, the facts averred being admitted.[65] In an action for an injunction to restrain the unlawful interference with the flow of water in the plaintiff's

brought to recover damages for diverting water claimed for irrigating purposes, and for an injunction, the defendant made no claim to be the riparian proprietor of the stream, but claimed the waters by prior appropriation and prescription, it was held that to support the claim for damages, the material allegations in the complaint were prior appropriation of the water by the plaintiff, and the diversion thereof by the defendant, and that it was unnecessary to aver riparian ownership in the plaintiff. Jerrett v. Mahan, 20 Nev. 89, 17 Pac. 12.

62 Moore v. Clear Lake Water Works, 68 Cal. 146, 8 Pac. 816.

63 Heintzen v. Binninger, 79 Cal. 5, 21 Pac. 377.

64 Ball v. Kehl, 87 Cal. 505, 25 Pac. 679.

65 United States Freehold Land & Emigration Co. v. Gallegos, 89 Fed. 769.

ditch, an allegation in the complaint that the plaintiff is the owner of lands planted in fruit trees, which, if deprived of such water, will die, is a sufficient allegation that the damage from the threatened injury would be irreparable.[66]

Where a suit is brought to recover damages for the unlawful diversion of water, and also for an injunction, in order to entitle the plaintiff to an injunction, it is only necessary, in addition to the facts averred in the complaint upon which the claim for damages is based, to aver facts sufficient to obtain equitable relief, without repeating the other averments.[67]

The plaintiff's recovery should, of course, be limited to the damages alleged and prayed for in the complaint. Thus, where, in an action to recover damages for loss of crops caused by the defendant's interfering with the plaintiff's irrigating ditch, and for an injunction, the plaintiff alleged in his complaint the loss of crops in 1897, and prayed for damages therefor, and obtained an injunction for the year 1898, it was held to be error to award damages for loss of crops in 1898 also, no amendment or supplemental complaint covering that year having been filed.[68] But it is immaterial that the plaintiff alleges more extensive rights than he really has. Thus, equity will grant relief in a case where the court finds

[66] Smith v. Stearns Rancho Co. (Cal., 1900) 61 Pac. 662.

[67] Jerrett v. Mahan, 20 Nev. 89, 17 Pac. 12.

[68] Miller v. Douglas (Ariz., 1900) 60 Pac. 722. Where, in an action for the diversion of water, the plaintiff claimed the right to 500 inches, and the jury awarded him 800 inches, and $1,000 damages for the unlawful diversion, and the plaintiff remitted the excess of 300 inches, it was held that judgment entered accordingly could not stand, for, if the nature of the case admitted of the remitting by the plaintiff of a portion of the water awarded him, he was not entitled to $1,000 damages. Dougherty v. Haggin, 61 Cal. 305.

that the quantity of water appropriated by the plaintiff is less than that alleged in his complaint.[69]

It has been held that where, in an action to recover for the wrongful diversion of water, the defendant relies upon the plaintiff's consent to the diversion as a defense, such defense need not be specially pleaded, but evidence thereof may be troduced under a general denial. This is not such new matter as is required to be specially pleaded, since neither its purpose nor effect is to discharge or avoid a cause of action theretofore existing, but to prove that the alleged cause of action never existed by showing that the material allegation of injury and damage to the plaintiff is not true.[70] But where the defendant relies on a right to divert the water acquired by adverse possession, he must plead such defense in his answer, or he will not be permitted to introduce evidence in support of it.[71] Where, in an action to maintain a riparian right to water, the defense is a prescriptive right of diversion, such defense is sufficiently pleaded under the California Code of Civil Procedure, by setting up the statute of limitations by reference to the section of the Code under which the right was acquired.[72]

The courts will be liberal in allowing amendments to the pleadings when these do not seriously impair the rights of the opposite party.[73] This is particularly the case in respect

69 Hill v. Lenormand (Ariz., 1888) 16 Pac. 266.

70 Churchill v. Baumann, 95 Cal. 541, 30 Pac. 770.

71 American Co. v. Bradford, 27 Cal. 361 (mining case). See Lillis v. Emigrant Ditch Co., 95 Cal. 553, 30 Pac. 1108.

72 Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379.

73 Saint v. Guerrerio, 17 Colo. 448, 30 Pac. 335. In an action for damages for breach of contract to furnish water for irrigation,

to amendments to the answer. The defendant may generally set up as many defenses as he may have. And he may be permitted to amend his answer by omitting the defense set up in the original answer, and, by new averments, set up an entirely new defense.[74]

§ 116. Action to Quiet Title.

An action may be maintained to quiet title to water rights acquired by appropriation.[75] The right to maintain the action does not depend upon an actual interference with the plaintiff's right. The assertion of an adverse claim is all that is required.[76] A water right being real estate, it is held in Colorado, where the administrator is not entitled to the possession of the decedent's real estate, that an action to quiet title thereto cannot be maintained by an administrator.[77] In such action, the pleadings are subject to the ordinary rules of pleading. Thus, a general demurrer to a whole complaint cannot be sustained if the complaint states facts, though imperfectly, showing that the plaintiff is entitled to relief, either legal or equitable.[78] Where in an action to quiet title to water rights claimed by the plaintiff as a riparian owner, and alleged to be appurtenant to certain of his lands, the plaintiff's ownership of such lands is denied, the burden is upon him to prove title thereto.[79]

the court, in its discretion, may permit the amendment of the complaint. Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39.

74 Gould v. Stafford, 101 Cal. 32, 35 Pac. 429.

75 See Salazar v. Smart, 12 Mont. 395, 30 Pac. 676.

76 Peregoy v. Sellick, 79 Cal. 568, 21 Pac. 966.

77 Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. 1020.

78 Hulsman v. Todd, 96 Cal. 228, 31 Pac. 39. See, also, as to pleadings in such actions, Peregoy v. Sellick, 79 Cal. 568, 21 Pac. 966; Harris v. Harrison, 93 Cal. 676, 29 Pac. 325.

79 Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. 908.

§ 117. Pollution of Water.

A prior appropriator of the water of a stream for irrigation is entitled not only to the quantity of water covered by his appropriation, but also to have the same continue to flow without being so polluted or contaminated by the discharge of refuse and other matter therein as to render it unfit for use for purposes of irrigation. And he may maintain an action to recover damages for such pollution, or to restrain its continuance.[80] What deterioration in quality would injuriously affect the water for irrigation, and whether or not the deterioration complained of in a particular case had this effect, are matters of fact for the consideration of the jury.[81] In order to entitle an irrigator to an injunction restraining the pollution of the water supplying his ditch, it must appear that he will be damaged by such pollution. Thus, the owner of a placer mine having a prior right to the use of the water of a stream will not be enjoined from working his mine so that the tailings are carried into the irrigating ditch, and upon the land of a subsequent appropriator of the water, where this result is a necessary incident to the use of the water in placer mining, and no real damage is done to the irrigator.[82]

The pollution of the water of an irrigating ditch ordinarily constitutes a private nuisance, which a court of equity will enjoin as such.[83] And in Colorado, where the supreme court

80 Montana Co. v. Gehring, 75 Fed. 384; Cushman v. Highland Ditch Co., 3 Colo. App. 437, 33 Pac. 344; Crane v. Winsor, 2 Utah, 248.

81 Montana Co. v. Gehring, 75 Fed. 384.

82 McCauley v. McKeig, 8 Mont. 389, 21 Pac. 22.

83 Crane v. Winsor, 2 Utah, 248.

will assume original jurisdiction of injunction proceedings only in cases of a public character, it has been held that the fact that a large number of persons are interested, and great interests extending into several counties are involved, is not sufficient to give the case a public character, so that the supreme court will assume original jurisdiction of a suit to restrain the pollution of a stream so as to render its waters unfit for irrigating purposes.[84] It has also been held, however that the befouling of the waters of a canal from which a number of persons, more than three, obtained water for irrigation and other purposes, so as to render it unfit for use, created a public nuisance, under a statute declaring that a public nuisance consists, among other things, in unlawfully doing an act which in any way renders three or more persons insecure in life or the use of property. It was further held in this case that the right to maintain such nuisance could not be gained by prescription.[85]

An action to enjoin the defendant from running mining debris and other matter into the plaintiff's irrigating ditch and upon his land, and for damages, must be tried as a whole, and not the two causes of action separately. In such action, the court must try the issue raised as to the injunction, and then, on the demand of either party, submit the question of damages to a jury, and thereafter render the proper judgment. It is error to try the issue as to the injunction, and enter judgment thereon and continue the question of damages to a subsequent term of the court.[86]

84 People v. Rogers, 12 Colo. 278, 20 Pac. 702.

85 North Point Consolidated Irr. Co. v. Utah & S. L. Canal Co., 16 Utah, 246, 52 Pac. 168.

86 Stocker v. Kirtley (Idaho, 1900) 59 Pac. 891. But see, as to the right to a jury in equitable actions, ante, § 114.

CHAPTER XI.

THE STORAGE OF WATER.

§ 118. Generally.
119. Liability of Reservoir Owner for Damages Caused by Reservoir.

§ 118. Generally.

To a limited extent, storage reservoirs have been constructed throughout the arid region for the purpose of storing, in times of abundance, water that might otherwise run to waste, so as to increase the available supply in times of scarcity. These reservoirs, when of any considerable size, are usually constructed and maintained by irrigation companies, but private reservoirs are not unknown. The right to construct reservoirs, and so to store water, is recognized by the state and federal statutes, and the storage of water is in several instances made the subject of express statutes.[1] There has been as yet but little litigation on the subject of reservoirs and water storage, and consequently there is very little law on the subject. Undoubtedly, however, all questions that may arise in this connection must be decided in accordance with the well-settled legal principles governing the use of water for irrigation.[2] The mere fact that the water diverted

[1] See stautes in Appendix. The policy of the state and federal governments has always been to encourage the preservation of water for irrigation and other purposes. Larimer Co. Reservoir Co. v. People, 8 Colo. 614, 9 Pac. 794.

[2] See, generally, the following cases, in which the rights of reservoir owners were involved: Rupley v. Welch, 23 Cal. 453; Water Supply & Storage Co. v. Larimer & Weld Irr. Co., 24 Colo.

for irrigation is not immediately used, but is kept in reservoirs until needed, does not necessarily affect the legality of the diversion. Such delay may, under the circumstances of the case, be entirely reasonable, within the rule that the appropriator has a reasonable time after diversion within which to apply the water to beneficial use.

In Colorado it is provided by statute that "persons desirous to construct and maintain reservoirs for the purpose of storing water shall have the right to take from any of the natural streams of the state and store away any unappropriated water not needed for immediate use for domestic or irrigating purposes."[3] Under this statute, of course, a reservoir owner can acquire by prior appropriation no right to fill his reservoir which would conflict with any right of a ditch owner to use the water for irrigation, when needed for immediate use, even though the priority of the latter was junior in time to the construction of the reservoir.[4] And an irrigation company which has acquired a right to certain quantity of water for irrigation has no right, by virtue of such priority, to divert an additional quantity of water for storage, so as to interfere with the right of another appropriator, whose right is prior to the company's appropriation

322, 51 Pac. 496; Water Supply & Storage Co. v. Larimer & Weld Reservoir Co., 25 Colo. 87, 53 Pac. 386, reversing 7 Colo. App. 225, 42 Pac. 1020; Cache La Poudre Reservoir Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 Pac. 331; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. 395; Rockwell v. Highland Ditch Co., 1 Colo. App. 396, 29 Pac. 285; Beaver Brook Reservoir & Canal Co. v. St. Vrain Reservoir & Fish Co., 6 Colo. App. 130, 40 Pac. 1066; New Loveland & G. Irr. & Land Co. v. Consol. H. S. Ditch & R. Co. (Colo. Sup., 1900) 62 Pac. 366.

3 Mills' Ann. St. § 2270.

4 Water Supply & Storage Co. v. Tenney, 24 Colo. 344, 51 Pac. 505.

for storage, though subsequent to that for irrigation.[5] But a junior appropriator cannot restrain the diversion of water for storage, where it does not appear that such diversion diminishes the quantity of water that would otherwise reach his land.[6]

Public reservoirs for the storage of water for irrigation and domestic uses are internal improvements, within the meaning of the act of congress of March 3, 1875, providing for the admission of Colorado as a state into the Union, and directing that certain moneys shall be paid to the state for making such internal improvements as the legislature shall direct; and the general assembly may lawfully make appropriations from such fund for the construction of such works.[7] A person desiring to store water may use as a reservoir a natural depression including the source or bed of a stream, provided the superior rights of prior appropriators are not thereby impaired.[8]

§ 119. Liability of Reservoir Owner for Damages Caused by Reservoir.

The damming and retaining of large bodies of water at elevations sufficiently great to allow the water to be used for irrigation is recognized as a danger and continual menace to lower proprietors on the course of the stream through which the water would find its natural outlet, and consequently the legislatures of Colorado and one or two other states have

[5] Colorado Milling & Elevator Co. v. Larimer & Weld Irr. Co. (Colo. Sup. 1899) 56 Pac. 185.

[6] Larimer & Weld Reservoir Co. v. Cache La Poudre Irr. Co., 8 Colo. App. 237, 45 Pac. 525, affirmed 25 Colo. 144, 53 Pac. 318.

[7] In re Senate Resolution, 12 Colo. 287, 21 Pac. 484.

[8] Larimer Co. Reservoir Co. v. People, 8 Colo. 614, 9 Pac. 794.

made the reservoir owner at least substantially an insurer of the life and property of others from injury from the bursting or overflow of the reservoir. The Colorado statute provides that "the owners of the reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom, or by floods caused by breaking of the embankments of such reservoirs."[9] A person may be the owner of a reservoir within this section, although his interest therein be less than an absolute fee. Thus, a lessee of a reservoir is within the meaning of the statute.[10] The plaintiff in an action for damages under the statute is not required to allege or prove negligence. A case at least prima facie is made when the damage and cause, by breaking of the reservoir, are established.[11]

The statute making the owners of reservoirs liable for damages occasioned thereby does not change the common-law rule concerning injunctive relief, nor deprive a court of equity of jurisdiction to restrain the filling of a reservoir, when the remedy at law is inadequate to afford relief.[12] And in a suit for an injunction, evidence that other persons are maintaining reservoirs in the same locality is irrelevant and inadmissible, for this fact would not give the defendant a right to maintain his reservoir, to the injury of adjacent lands.[13]

9 Mills' Ann. St. § 2272.

10 Larimer Co. Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. 1111.

11 Id.

12 Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760.

13 Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760.

CHAPTER XII.

PUBLIC CONTROL OF IRRIGATION.

§ 120. Generally.
121. In Colorado.
122. In Wyoming.
123. In Other States.

§ 120. Generally.

By the constitutions of several of the states, the water of the natural streams within the state is declared to be the property of the public or of the state.[1] We have seen that the use of water for irrigation, sometimes at least, is a public use.[2] From these propositions it necessarily follows that in those states in which the constitutional provisions mentioned above exist, the use of water for irrigation must be subject to the control of the state. In California and Idaho the use of all water appropriated for sale, rental or distribution is expressly declared to be a public use, and subject to the regulation and control of the state,[3] and in Wyoming the constitution vests the control of water generally in the state.[4]

But irrespective of any such constitutional provisions, the

[1] Const. Colo. art. 15, § 5; Const. N. D. art. 17, § 210; Bigelow v. Draper, 6 N. D. 152; Const. Wyo. art. 8, § 1; Farm Inv. Co. v. Carpenter (Wyo., 1900) 61 Pac. 258.

[2] See ante, § 4.

[3] Const. Cal. art. 14, § 1; Const. Idaho, art. 15, § 1; Lanning v. Osborne, 76 Fed. 319; San Diego Land & Town Co. v. Sharp, 97 Fed. 394; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264; Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720; Wilterding v. Green (Idaho, 1896) 45 Pac. 134.

[4] Const. Wyo. art. 2, § 31.

state has undoubted power to regulate the use of water within its boundaries for irrigation under its general power to regulate the affairs of its citizens, so far as the public interests may be affected thereby. As has been said: "The authority of the general assembly to enact laws regulating the distribution of water to actual appropriators, provided they do not substantially affect constitutional or vested rights, is undoubted."[5] In all of the arid states, statutes have been enacted providing for the regulation and control of the distribution and use of water for irrigation. In several states the legislature has provided elaborate systems of control, which will be considered in the succeeding sections of this chapter.

[5] Elliott, J., in Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028. While the legislature cannot prohibit the appropriation or diversion of unappropriated water, for useful purposes, from natural streams upon the public domain, it has the power to regulate the manner of effecting such appropriation or diversion by reasonable and constitutional legislation. Larimer County Reservoir Co. v. People, 8 Colo. 614, 9 Pac. 794.

In White v. Farmers' High Line Canal & Reservoir Co., 22 Colo. 191, 43 Pac. 1028, Hayt, C. J., said: "The right to the use of water in the arid region is among the most valuable property rights known to the law. Where there are a large number of consumers taking water from the same ditch, the excessive use by some may absolutely deprive others of water at times when its application to the thirsty soil is absolutely necessary to prevent the total failure of growing crops. So, also, as between different ditches, if one, in case of scarcity, takes from a public stream water to which it is not entitled, it must be at the expense of others. From the very nature of the business, controversies with reference to the use of water naturally led to unseeming breaches of the peace, and to avoid these it was found expedient and necessary to provide complete rules of procedure governing the taking of water from the public streams of the state, and

§ 121. In Colorado.

The state of Colorado is divided by statute into six "water divisions,"[6] comprising sixty-nine "water districts;"[7] the districts being composed of lands irrigated from ditches taking water from certain designated streams. The supervision of irrigation in the state is committed to the following officers, named in the order of their relative superiority: A state engineer, a superintendent of irrigation for each division, and a water commissioner for each district,—all these officers being appointed by the governor.

The state engineer has general supervising control over the public waters of the state. He is required to measure the flow of streams, and compute the discharge; to collect all necessary data and information as to dams and reservoirs to be constructed, and the feasibility and economical construction of reservoirs on eligible sites, and as to the snowfall in the mountains each season, for the purpose of predicting the probable flow of water, and publish the same; to approve the designs and plans for dams and reservoir embankments ten feet or more in height; and have general charge over the work of division superintendents and district commissioners, furnish them with necessary data and information, and require them to report to him. He is also required to report to the governor. Provision is made for the appointment of deputies and assistants.[8]

regulating its distribution to those entitled thereto. Authority for such regulations may properly be based upon the principle that, when private property is 'affected by a public interest, it ceases to be juris privati only.'"

6 Mills' Ann. St. §§ 2440-2446.

7 Mills' Ann. St. §§ 2310-2380; Laws 1897, p. 175.

8 As to the appointment, duties, compensation, etc., of the state engineer, see Mills' Ann. St. §§ 2458-2469.

Superintendents of irrigation have general control over the water commissioners of the several districts within their divisions, and are required, under the general supervision of the state engineer, to execute the laws relative to the distribution of water in accordance with the rights of priority of appropriation as established by judicial decrees, and perform such other functions as may be assigned to them by the state engineer. In the distribution of water they are to be governed by the statutes in force, but have authority to make other regulations not in violation of the laws, but supplemental thereto, to secure the equal distribution of water in accordance with the rights of priority. An appeal is allowed from any order or regulation of such superintendents to the state engineer by any person, ditch company, or ditch owner who may deem himself injured or discriminated against thereby.

Superintendents are required to commence the discharge of their duties in their respective divisions as soon as the first water commissioner in any district within the division shall be called out, and to continue to discharge such duties until the last water commissioner in any division ceases to be needed.[9]

Superintendents have the right to call out water commissioners within their divisions whenever they may deem it necessary, and have power also to perform the duties of water commissioners.

The superintendents are required to give bond, and it is provided that their expenses and salary shall be paid pro rata by the counties interested.

[9] As to superintendents of irrigation, see Mills' Ann. St. §§ 2447-2457.

The constitutionality of the act providing for the appointment of superintendents of irrigation has been attacked on the ground that the purposes of the act are not clearly expressed in its title, and also because its provisions, if enforced, would deprive parties of their priority to the use of water without due process of law. The act was held constitutional as against both objections. As to the second objection, it will be noted that under the act the superintendent is required to distribute water within his division in accordance with the decrees of courts having jurisdiction, without regard to the water districts in which such decrees may have been entered, although, by the statutes providing for such adjudications, notice is provided only for those claiming water in the particular district the priority of which is to be adjudicated. No provision is made for those owning lands situate outside of the district to be made parties to the proceeding, although the same stream may be relied on as the common source of supply, and the different interests may therefore be antagonistic. But it does not follow from this that the act is in violation of the inhibition against the taking of property without due process of law. It was held in the case in which the present questions were raised that the act clothes the superintendent with no judicial power. He is required to ascertain and keep a record of the priorities as established by the decrees of the district court, and, to the best of his ability, take care that each ditch shall receive the water to which it may be entitled under such decrees. The power conferred is executive, and not judicial. Moreover, while the decrees are made prima facie evidence as between the different districts, they are not conclusive. The courts are still open for the purpose of entertaining the usual pro-

ceedings, statutory or otherwise, that have been found appropriate for determining the priorities between claimants for water for irrigation of lands lying in different districts. The act, therefore, does not provide for a taking of property without due process of law.[10]

The statute provides that in case any ditch, canal or reservoir in any district within a water division shall fail to receive its regular supply of water, the owner or controller thereof may report such fact to the water commissioner of that district, who shall immediately apportion the water in his district, and report such fact to the superintendent of the division, whose duty it shall be to compare such report with the register of priorities kept by him, and if any ditch, canal or resorvoir of any other district of his division is receiving water to which any ditch, etc., of any other district is entitled, he shall at once order the shutting down of such postdated ditches, etc., and the water given to the ditches, canals and reservoirs having the prior right thereto.[11] It is held that mandamus to compel the state engineer and other officers charged with the supervision and distribution of water to close the gates and shut off the water from postdated ditches will not lie under this section as a matter of course, but only when the rights of the applicant and of third parties have been adjudicated and judicially determined. The statute invests the officer with a certain amount of judicial discretion in determining the rights of the parties. He is required to find and determine from the register of priorities whether or not water is being improperly taken by any ditches; which,

[10] Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 Pac. 444.

[11] Mills' Ann. St. § 2456.

if any, ditches shall be closed; and, when these ditches are so closed, whether the applicant would be entitled to the water, and could make it available.[12]

It is the duty of the water commissioners to divide the water in the streams of their district among the several ditches taking water from the same, according to the prior rights of each respectively, and "in whole or in part to shut and fasten, or cause to be shut and fastened, by order given to any sworn assistant, sheriff or constable of the county in which the head of such ditch is situated, the headgates of any ditch or ditches heading in any of the natural streams of the district, which, in a time of a scarcity of water, shall not be entitled to water by reason of the priority of the rights of others below them on the same stream."

The water commissioners are empowered, and it is made their duty, "upon the application of the owners of one or more ditches in their district, to immediately make, or cause to be made, a thorough examination of all ditches within their district for the purpose of ascertaining what use is being made by the owners of or consumers of water from said ditches; and if at any time he shall ascertain that the owner or owners of any ditch drawing water from the natural streams furnishing water to his district shall be permitting any of the waters flowing in such ditch to go to waste, or to be wastefully or extravagantly or wrongfully used by its water consumers, or put to any other use than that to which it is entitled to be used in the order of priority, at such times

12 Farmers' Independent Ditch Co. v. Maxwell, 4 Colo. App. 477, 36 Pac. 556. It may be appropriately noted in this connection that an early Montana act, conferring power on water commissioners to apportion water for irrigation, was held unconstitutional as conferring judicial power. Thorp v. Woolman, 1 Mont. 168.

as the same is being needed by other appropriators, it shall be the duty of such water commissioner to immediately shut off the supply of water in such ditch to such an extent as in his judgment was wasted, or extravagantly, wastefully or wrongfully used." Failure to perform the duties here imposed is made a misdemeanor.

The commissioner is required, "after being called upon to distribute water, to devote his entire time to the discharge of his duties when such duties are required, so long as the necessities of irrigation in his district shall require; and it is made his duty to be actively employed on the line of the stream or streams in his water district, supervising and directing the putting in of headgates, waste gates, keeping the stream clear of unnecessary dams or other obstructions, and such other duties as pertain to a guard of the public streams in his water district; and for willful neglect of his duty, he shall be liable to fifty dollars fine, with costs of suit." The "water commissioners shall not begin their work until they shall be called on by two or more owners or managers, or persons controlling ditches in their several districts, by application in writing, stating that there is necessity for their action; and they shall not continue performing services after the necessity therefor shall cease."

Water commissioners, in the discharge of their duties, are invested with the powers of constables, and may arrest any person violating their orders relative to the opening or shutting down of headgates, or the using of water for irrigation purposes.[13]

[13] As to water commissioners, see Mills' Ann. St. §§ 2291, 2381-2392; 3 Mills' Ann. St. §§ 2384a, 2384b, 2388a. Under section 2387, each county in which a water district lies is liable for an equal part

It is provided that any person having charge of the distribution of water who shall receive a bribe to influence him to distribute the water dishonestly, and any person who shall give or offer such bribe, shall be deemed guilty of a misdemeanor, and subject to fine.[14]

Provision is made for the prorating of water in times of scarcity among all the consumers of water from the same ditch or reservoir, according to the amount to which each is entitled, so that each shall suffer from the deficiency in proportion to the amount of water which he would have received had no such deficiency occurred.[15] By the construction placed upon this statute, it should be so limited in its operation as not to conflict with the priority rule.[16]

Several statutes have been passed in Colorado providing for the construction of state canals[17] and reservoirs[18] for irrigation purposes, to be constructed, owned and controlled by the state. Such canals and reservoirs are internal improvements, within the meaning of the acts of congress providing that a certain portion of the proceeds of the sale of public lands lying within the state shall be paid to the state for the purpose of making such internal improvements within

of the commissioners' compensation. Board County Com'rs Park Co. v. Locke, 2 Colo. App. 508, 31 Pac. 351. See, also, Board County Com'rs Pueblo Co. v. Gould, 6 Colo. App. 44, 39 Pac. 895.

14 Mills' Ann. St. § 2398.

15 Mills' Ann. St. § 2267.

16 Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278; Larimer & Weld Irr. Co. v. Wyatt, 23 Colo. 480, 48 Pac. 528. See, also, Coffin v. Left Hand Ditch Co., 6 Colo. 443.

17 Mills' Ann. St. §§ 2478-2495; 3 Mills' Ann. St. §§ 2489a-2495m. In re Canal Certificates, 19 Colo. 63, 34 Pac. 274.

18 Mills' Ann. St. §§ 2470-2477; 3 Mills' Ann. St. 2495n-2495h2.

the state as the legislature may direct,[19] but the internal improvement fund can be made available for the construction of canals and reservoirs only by an express appropriation.[20] Until otherwise provided by law, the board of land commissioners is directed to regulate the distribution of water from state canals and reservoirs under such rules and regulations as such board shall deem to be for the best interests of the state, and to charge and collect rental for the carriage of water therein.[21]

§ 122. In Wyoming.

The constitution of Wyoming declares that the natural waters of the state are the property of the state,[22] and that the control thereof is in the state, which, in providing for the use of water, shall equally guard all the various interests involved.[23] Provision is made for a board of control, the division of the state into four water divisions, the appointment of

[19] In re Senate Resolution, 12 Colo. 285, 21 Pac. 483; In re Senate Resolution, 12 Colo. 287, 21 Pac. 484; In re Canal Certificates, 19 Colo. 63, 34 Pac. 274.

[20] In re Canal Certificates, 19 Colo. 63, 34 Pac. 274. In this case, it was held that the act of 1893, providing for the construction of state canal No. 1, is unconstitutional in so far as it authorizes the acceptance of certificates of indebtedness issued for the construction of the canal in payment for lands purchased from the state. But such certificates may be received, as provided by the act, in payment of charges for the carriage of water in such canal, or for perpetual water rights thereunder.

[21] 3 Mills' Ann. St. § 3657a.

[22] Const. art. 8, § 1. This declaration of the constitution is not unconstitutional, as impairing the vested rights of persons who had appropriated water prior to the adoption of the constitution, since such persons never had any title to the water in its natural channels. Farm Inv. Co. v. Carpenter (Wyo., 1900) 61 Pac. 258.

[23] Const. art. 2, § 31.

division superintendents, and of a state engineer with general supervision of the waters of the state, and of the officers connected with its distribution.[24]

Pursuant to the constitutional requirements, the first state legislature, by an act entitled "An act providing for the supervision and use of the waters of the state," approved December 22, 1890, provided a system of state control of the use of water. Prior to this act, the irrigation laws of Wyoming were similar to those of Colorado, though less complete. Some features of the old system have been retained, but many changes have been made, and new features introduced. The act of 1890 has been supplemented by several later statutes.

The leading features of the system are the creation of a board of control, consisting of the state engineer and the superintendents of the four water divisions, the division of the state into water divisions and districts, and the provisions for the appointment of water superintendents and commissioners.

The board of control has, under the regulations prescribed by law, the supervision of the waters of the state, and their appropriation, distribution and diversion, and of the various officers connected therewith; its decisions being subject to review by the courts.[25] The board has an office with the state engineer at the capital at Cheyenne, and holds two meetings each year for the transaction of such business as may come before it. The first meeting begins on the second Wednesday in March, and the second on the third Wednesday in October. The state engineer is ex officio president of the

24 Const. art. 8, §§ 2, 4, 5.

25 Id.

board, and has a right to vote on all questions. A majority of the board constitutes a quorum to transact business. The superintendent of water division number one is secretary of the board, and is required to keep a record of its transactions, and of the special land commission, and to certify under seal all certificates of appropriation of water made in accordance with law.[26]

The state of Wyoming is divided by statute into four water divisions, designated by the statute. The statute provides for one superintendent of each of these divisions, to be appointed by the governor, with the consent of the senate, who shall hold office for four years, or until his successor is appointed and shall have qualified, and who shall reside in the water district for which he is apppointed.

The duties of the division superintendents and of the water commissioners are substantially the same as those of the corresponding officers in Colorado. Thus, the superintendent has control over the water commissioners of the several districts within his division, and of the distribution of water in such division, under the general supervision of the state engineer, and is required to perform such other functions as may be assigned him by the state engineer, and also such duties as may devolve upon him as a member of the board of control. In the distribution of water, the superintendent is to be governed by the statutes in force, but for the better discharge of his duties, he is authorized to make such other regulations to secure the equal and fair distribution of water in accordance with the rights of priority of appropriation as may,

[26] Rev. St. 1899, §§ 857, 858. As to the duties of the board in respect to the adjudication of priorities, see Rev. St. 1899, §§ 859-887, and ante, § 106.

in his judgment, be needed in his division, provided such regulations shall not be in violation of law, but shall be merely supplemental to and necessary to enforce the laws. An appeal may be taken from such orders or regulations by any person deeming himself injured or discriminated against thereby to the state engineer, by filing with the engineer a copy of the order or regulation complained of, and a statement of the manner in which the same injuriously affects the petitioner's interest. The engineer, after due notice, shall hear the testimony offered by the petitioner, and through the superintendent may suspend, amend or confirm the order complained of. All water commissioners are required to make reports to the superintendent of their division as often as deemed necessary by the superintendent, such reports to contain certain information as to the water supply, ditches, etc., in each district, as prescribed by the statute. These reports are to be filed and preserved by the superintendent, and are to be used by him as the basis of his orders respecting the distribution of water. They are to be filed and kept in the office of the state engineer.[27]

The board of control is required by statute to divide the state into water districts, to be so constituted as to secure the best protection to the claimants for water, and the most economical supervision by the state; such districts not to be created until a necessity therefor shall arise; but from time to time, as the appropriations and priorities thereof from the streams of the state shall be adjudicated.

A water commissioner, who must be a resident of the dis-

[27] As to water divisions and superintendents, see Rev. St. 1899, §§ 848-856.

trict, is to be appointed for each district, the appointment to be made by the governor from persons recommended by the superintendent of the water division in which the district is situated. The commissioners hold office two years, and the governor has power to fill vacancies or remove any commissioner for neglect of duty.

It is the duty of the water commissioner "to divide the water in the natural stream or streams of his district among the several ditches taking water therefrom, according to the prior rights of each, respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, under the direction of the superintendent of his water division, the headgates of ditches heading in any of the natural streams of the district when, in times of scarcity of water, it is necessary to do so by reason of the priority of rights of others taking water from the same stream, or its tributaries." The commissioners "shall so divide, regulate and control the use of the water of all streams within their respective districts in such manner, as near as may be, as will prevent unnecessary waste of water, and to that end such commissioner shall so shut and fasten the headgate or gates of all ditches so that no more water will flow into said ditch than is actually required and will be used for the uses and purposes for which such water was appropriated, and any person who may be injured by the action of any water commissioner, or by his failure to act pursuant to" the statute, "may resort to any court of competent jurisdiction for such relief as he may be entitled to." The commissioners shall not begin work until called upon by two or more ditch owners, controllers or managers, by application in writing, stating that there is a necessity for the use of water, and they shall not continue per-

forming services after the necessity therefor shall cease.[28]

An important feature of the Wyoming system is found in the provisions governing the procedure relative to the appropriation of water. It is provided substantially that all persons, associations or corporations intending to appropriate water are required to first make an application to the state engineer for a permit to make such appropriation. The application must set forth the name and address of the applicant, the source of the water supply, the nature of the proposed use, the location and description of the proposed ditch, canal or other work, and the time of beginning and completing the work, and of the application of the water to the proposed use. It is the duty of the engineer to approve all applications, made in proper form, which contemplate the application of the water to a beneficial use, where the proposed use does not tend to impair the value of existing rights, or be otherwise detrimental to the public welfare. But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interests, the engineer shall reject the application, and refuse to issue the permit asked for. An appeal is allowed from an adverse decision of the engineer to the board of control, and from the decision of the board to the district court of the proper county. Maps and plans of the proposed works are required to be filed with the engineer. Upon the completion of an appropriation in accordance with the application and indorsement thereon of the state engineer, the board of control is required to send a certificate of appropriation to the county

28 As to water districts and commissioners, see Rev. St. 1899, §§ 888-894.

clerk of the county in which the appropriation shall have been made, and such clerk shall record the certificate, and transmit it to the appropriator. The priority of such appropriation shall date from the filing of the application in the engineer's office.[29]

§ 123. In Other States.

In several other states besides Colorado and Wyoming, systems of state or public control of irrigation, more or less complete, are provided by statute. The more important examples of such systems are based upon that of Colorado or of Wyoming, already considered. A brief statement of the system of each state will therefore be sufficient for the purposes of this work.

In Nebraska the regulation of irrigation is committed to a state board of irrigation, composed of the governor, attorney general and commissioner of public lands and buildings. The system of control adopted is substantially the same as that of Wyoming.[30]

In Washington, each county of the state is constituted an irrigation district, and for each district a water commissioner may be appointed by the county commissioners. The duties of the water commissioner are substantially the same as those of such officers in Colorado, the statutes of which state on the subject having been adopted with but little change.[31]

29 Rev. St. 1899, §§ 917-929.

30 Comp. St. 1899, § 5444 et seq.

31 Bal. Code, §§ 4125-4131. The statutes also provide for the appointment of commissioners by the judge of the superior court of the county, whose duties are to allot and apportion the water in certain cases. Bal. Code, §§ 4105, 4108, 4111. These provisions, so far as the appointment of the commissioner is concerned, seem

In Nevada, by an act approved March 16, 1899, provision is made for the creation of county boards of water commissioners, composed of the county commissioners and the county surveyor of each county. It is left to the discretion of the several boards of county commissioners whether the county shall avail itself of the provisions of the act as to forming a board of water commissioners. The duties and powers of the boards of water commissioners are similar to those of the Wyoming board of control. Persons desiring to appropriate water are to make application to the board of commissioners, who are to pass upon such applications.[32]

In Idaho, a recent statute provides that in all cases where the waters of any stream used for irrigation or other purposes have been adjudicated and allotted by a decree of the district court, such court, or the judge thereof, shall appoint a water master of the stream or streams included in the decree to distribute the water according to the provisions of the decree. The powers and duties of the water masters are prescribed in detail by the statute.[33] Another statute provides that the boards of county commissioners of the respective counties shall constitute boards of water commissioners with power to enforce the statutes providing for the appropriation and distribution of water.[34]

In California, several early statutes provided for water

to be based on Mills' Ann. St. Colo. § 2259, of which section 4105, supra, is substantially a copy. This section, however, is obsolete in Colorado.

32 Comp. Laws 1900, §§ 361-373.

33 Laws 1899, p. 369.

34 Laws 1899, p. 386, § 34.

commissioners for particular counties.[35] It has been held that such water commissioners are merely agents selected for the public convenience, to regulate the distribution of water according to the rights of the parties in interest; and their action in distributing water does not conclude interested parties from obtaining redress in the courts, if other persons have been given more than their just proportion of water.[36]

In Arizona and New Mexico, a system of public control has been adopted which differs considerably from that obtaining elsewhere in the arid region. The system is borrowed from the Mexican law.[37] The statutes provide for the construction and control of public acequias, or irrigating canals, owned by a number of persons taking water therefrom. These acequias are constructed and kept in repair by public labor, and are controlled by officers elected by the people interested.[38]

The failure of the owners of an acequia to elect a "mayordomo," and work the acequia, under the New Mexico law regulating acequias, will not justify persons having no interest in such acequia in wrongfully appropriating water flowing through it.[39]

In Utah a system of municipal control obtains. City councils are given power "to control the water and watercourses leading to the city, and to regulate and control the water-

[35] See Daley v. Cox, 48 Cal. 127; Knox v. Board Sup'rs, Los Angeles Co. 58 Cal. 59; Charnock v. Rose, 70 Cal. 189, 11 Pac. 625; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76.

[36] Daley v. Cox, 48 Cal. 127.

[37] As to the Mexican law of irrigation, see Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

[38] Rev. St. Ariz. 1887, §§ 3199-3226; Comp. Laws N. M. 1897, §§ 1-51. For text or substance of these sections, see Appendix.

[39] De Baca v. Pueblo of Santo Domingo (N. M., 1900) 60 Pac. 73.

courses and mill privileges within the city; provided, that the control shall not be exercised to the injury of any right already acquired by actual owners;" and also "to construct, purchase or lease and maintain canals, ditches and reservoirs; and to purchase or lease springs, streams or sources of water supply for the purpose of providing water for irrigation, domestic or other purposes; and, if necessary to secure said sources of water supply, to purchase or lease the land upon which said water has been appropriated or applied."[40] Special or local taxes may be levied by the city council for the above purposes.[41] A municipality cannot, by virtue of these provisions, acquire a right to water to which others have acquired a paramount right and ownership prior to the incorporation of the municipality, without the acquiescence of such owners.[42] Independently of these statutes, a city may take possession and control of the waters of a stream, and regulate the distribution thereof, with the consent of the original owners and appropriators.[43]

40 Rev. St. 1898, pp. 17, 18, § 206.

41 Rev. St. 1898, § 279.

42 Fisher v. Bountiful City (Utah, 1899) 59 Pac. 520.

43 See City of Springville v. Fullmer, 7 Utah, 450, 27 Pac. 577; Holman v. Pleasant Grove City, 8 Utah, 78, 30 Pac. 72.

CHAPTER XIII.

IRRIGATION COMPANIES.

§ 124. Generally.
125. Acquisition of Water Rights—Generally.
126. Same—Appropriation by Irrigation Companies.
127. Same—Condemnation of Water Rights.
128. Acquisition of Right of Way.
129. By-Laws and Regulations.
130. Irrigation Companies Public Carriers of Water.
131. Duty to Furnish Water to Consumers.
132. Contracts for Water Rights.
133. Rates for Furnishing Water.
134. Transfer of Stock in Irrigation Companies.

§ 124. Generally.

With the late rapid development and expansion of agricultural interests in the arid region, and the consequent greatly increased need of irrigation, the supplying of water to farming lands has become in many parts of the country too great an undertaking for individual farmers acting independently, and the general work of irrigation is now very largely performed by irrigation companies organized for the purpose of conducting the water from the streams, and distributing it to the farmers along the line of their canals. These canals are often many miles in length, costing in some instances hundreds of thousands of dollars, and by distributing the water over large areas of territory, often remote from the source of supply, they render available for agricultural purposes great tracts of land which could otherwise be cultivated

only at very great or even at prohibitive expense.[1] In most or all of the arid states, statutes have been passed providing for the organization of these companies, defining their rights, and regulating the relations between the companies and consumers under their canals.[2]

These organizations may be divided into two general classes,—private companies, usually incorporated and commonly known as "irrigation companies" or "ditch companies," and public corporations, known as "irrigation districts." The subject of irrigation districts will be treated in the next chapter, the present chapter being devoted to a discussion of private irrigation companies only.

Private irrigation companies are organized under the statutes according to the same general rules as private corporations generally, and present no features in this respect not common to all corporations. Their rights, powers, duties and liabilities as defined by the legislatures and courts, so far as peculiar to these corporations, are such as arise from the special purpose of their organization. Private ditch companies may be organized for the purpose of conveying water for hire to consumers generally, or they may be associations formed by consumers for the purpose of conveying water solely for the irrigation of their own lands, and not for hire. These associations, sometimes called "mutual ditch companies," may or may not be incorporated, and the respective interests of the members may or may not be represented by shares of stock.[3] When incorporated, the relation between

1 See Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487.

2 See statutes in Appendix.

3 Per Helm, C.J., in Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966.

the ditch company and its members, as in the case of other corporations, is one of contract, from which contract arises a trust with which the corporation is charged to conduct the common business in the interests of the shareholders.[4] Each share of stock in respect to the benefits to which it entitles its holder is equal to every other share, and the interest of each stockholder in the water carried is in exact proportion to the amount of his stock; and the duty assumed by the company is to use reasonable care and diligence in conveying the water, keeping the means of conveyance in repair and making a ratable distribution.[5] The stock in such companies may be assessed for expenses of maintenance, etc., and may be sold for the nonpayment of assessments levied thereon.[6]

An irrigation company, like other corporations, is a trustee for its stockholders and consumers, and is bound to protect their interests, and may maintain an action for this purpose.[7]

§ 125. Acquisition of Water Rights—Generally.

The statutes providing for the organization of irrigation companies confer upon such companies, either expressly or by necessary implication, the power to acquire water rights. It is to be observed that legislative authority to acquire water

[4] Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. 691; Rocky Ford Canal, etc., Co. v. Simpson, 5 Colo. App. 30, 36 Pac. 638.

[5] Rocky Ford Canal, etc., Co. v. Simpson, 5 Colo. App. 30, 36 Pac. 638.

[6] Hall v. Eagle Rock & Willow Creek Water Co. (Idaho, 1897) 51 Pac. 110.

[7] Riverside Water Co. v. Sargent, 112 Cal. 230, 44 Pac. 560; Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. 691; Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 Pac. 444; Montrose Canal Co. v. Loutsenhizer Ditch Co., 23 Colo. 233, 48 Pac. 532; Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588.

rights, conferred upon an irrigation company by its charter, does not confer the water rights themselves, but these can be acquired only in the manner provided by law.[8] A water right may be acquired by an irrigation company by appropriation, by purchase or gift or by condemnation. In a limited sense, also, a water right may be acquired by legislative grant. The acquisition of water rights by appropriation and condemnation will be discussed in subsequent sections of this chapter.[9] The acquisition by purchase or gift calls for no particular treatment in this connection, for the fact that a corporation is a party to the transfer introduces no new feature into the law of the transfer of water rights, already fully treated in this work.[10]

With reference to the acquisition of water rights by grant of the legislature, it is plain that the legislature cannot grant to a corporation the exclusive right to the water of a stream, so as to interfere with private vested rights.[11] And it has been held that an act granting to canal and other companies the free use of the waters and streams of the state applies only to streams upon the public lands, for the legislature has no power to take away or impair the vested rights of riparian owners without providing for the payment of a just compen-

8 Mud Creek Irr., etc., Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078.

9 See post, §§ 126, 127.

10 See ante, c. 7. One irrigation company may grant to another the right to take water from its canal. North Point Consol. Irr. Co. v. Utah & S. L. Canal Co., 16 Utah, 246, 52 Pac. 168. Where an irrigation company succeeds to the rights of a former company, it takes the property of the latter subject to any rights of an individual in the old company's water right not surrendered by him to the new company. Beck v. Pasadena Lake Vineyard Land & Water Co. (Cal., 1899)) 59 Pac. 387.

11 Munroe v. Ivie, 2 Utah, 535.

sation.[12] It is submitted that such an act, so far as it confers the right to use the water for irrigation or other purposes, is superfluous, for such right may be acquired by appropriation under the general laws governing the appropriation of water. Again, as stated above, a legislative grant is not so much a grant of the water right itself as of the privilege of acquiring such right.

The power of a ditch company, under its certificate of incorporation, to purchase water rights, can be questioned only by the state.[13]

§ 126. Same—Appropriation by Irrigation Companies.

An irrigation company may acquire water rights by appropriation in the same manner as an individual, and subject to the same general laws. The mere fact that the appropriation is made by a company instead of by an individual does not change any of the rules of law as to what water may be appropriated, or what constitutes an appropriation. Individuals may organize a company, either by or without incorporation, for the construction of an irrigating ditch, and may by such means divert the unappropriated waters of a natural stream. By the construction of the ditch and the diversion of the water they may acquire a prior right to the water diverted, provided they apply the same to beneficial use within a reasonable time after diversion. But they cannot postpone the exercise of such right for an unreasonable time, so as to prevent others from acquiring a right to the water; nor can they acquire a right to dispose of the water contrary to the

[12] Mud Creek Irr., etc., Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078.

[13] Water Supply & Storage Co. v. Tenney, 24 Colo. 344, 51 Pac. 505.

priority rule where this obtains. With irrigation companies, as with individuals, the mere diversion of water is not an appropriation of it; there must be an application of the water to beneficial use within a reasonable time, or the diversion is unlawful. The very birth and life of a prior right to the use of water is actual user.[14] In the case of an appropriation by an individual, the diversion and application of the water to beneficial use will, of course, both ordinarily be made by the same person, while, in the present case, the water will be diverted by the company, and, except in the case of mutual companies, or where the company irrigates its own lands, the application to beneficial use will be made by an individual, who may not sustain any other relationship to the company than that of a consumer under its ditch. In other words, the appropriation is begun by one person,—the company,—and completed by another,—the consumer. Both the actual diversion and the application to beneficial use are essential to the completeness and validity of the appropriation. But it is not necessary that the appropriation should be wholly accomplished by one person, but it may be effected by several persons acting in conjunction. If one person diverts water without making any use of it either personally or through others, and a stranger takes the water from the ditch, and applies it to his lands without having had anything

[14] Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487; Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966. See New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989. Ditch companies as carriers are appropriators or quasi appropriators of water, and acquire certain rights by priority of appropriation, or, strictly speaking, priority of diversion, their priorities being dependent upon their supplying the water to actual consumers. Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028.

to do with its diversion, either directly or indirectly, it is perhaps true that neither acquires any valid right to the water. But however this may be, there is clearly such a privity between the ditch company and the consumer as to establish a sufficient connection between the diversion and the application of the water to render the appropriation complete. The ditch company in such case acts merely as the agent of the consumer in conducting the water to his lands, and acquires in and of itself no independent priority, and any rights it may hold in connection with the water diverted depend for their continuance upon the use made by consumers.[15] The consumer is an appropriator from the nat-

[15] Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028. In this case Helm, C. J., said: "The constitution recognizes priorities only among those taking water from natural streams. Therefore, to constitute an appropriation such as is recognized and protected by that instrument, the essential act of diversion, with which is coupled the essential act of use, must have reference to the natural stream. But the consumer himself [taking water from a ditch company's ditch] makes no diversion from the natural stream. The act of turning water from the carrier's canal into his lateral cannot be regarded as a diversion, within the meaning of the constitution, nor can this act, of itself, when combined with the use, create a valid constitutional appropriation. There is therefore no escape from the conclusion, hitherto announced by this court, that in cases like the present the carrier's diversion from the natural stream must unite with the consumer's use in order that there may be a complete appropriation, within the meaning of our fundamental law. The carrier makes a diversion both in fact and in law. This diversion is accomplished through an agency (the carrier) recognized by the constitution and statutes, and for purposes expressly named in both, hence it cannot be challenged as illegal. It would undoubtedly become unlawful were the water diverted not applied to beneficial uses within a reasonable time; but when thùs applied, the diversion unquestionably ripens into a perfect appropriation." For extensive opinion

ural stream through the intermediate agency of the ditch.[16]

It follows from the foregoing that under the doctrine of appropriation the ditch company is not the proprietor of the water diverted by it,[17] but is an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise, prosecuted for the benefit of its owners.[18] The ownership of the water itself, except perhaps as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the public, with a perpetual right to its use, free of charge, in the people.[19] It follows that an irrigation company can charge the consumer only for the transportation of the water as a carrier, and can exact nothing for the water itself, or for the right to its use. In these it possesses no salable interest.[20] The statements just made should be so limited as to apply only to cases where the water is diverted by the company, and used by an individual. Of

as to appropriation by irrigation companies, see Albuquerque Land & Irr. Co. v. Gutierrez (N. M., 1900) 61 Pac. 357.

16 Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. 144. See Wright v. Platte Val. Irr. Co. (Colo. Sup., 1900) 61 Pac. 603.

17 Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487; Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028; Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966; Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. 144, reversing 1 Colo. App. 480, 29 Pac. 906.

18 Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028; Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280. See, also, Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. 472.

19 Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487; Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028.

20 Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487.

course, where the appropriation is wholly made by the company,—that is, where the company not only diverts the water, but also uses it on lands belonging to it,—it becomes the owner of the water right, and may sell the right, just as any other owner may do.

§ 127. Same—Condemnation of Water Rights.

In jurisdictions in which the doctrine of riparian rights obtains, the statutes in some cases provide for the condemnation of the water rights of riparian proprietors by irrigation companies under the power of eminent domain. The power of the legislature to authorize the taking of water rights in this manner cannot be questioned. The use contemplated is regarded as public, and full provision is made for the payment of due compensation to the owner of the rights thus acquired. It seems, however, that the power is one which should be exercised only when the public interests imperatively demand it.[21]

[21] That water rights may be condemned, see Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Aliso Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537.

In Umatilla Irr. Co. v. Barnhart, 22 Ore. 389, 30 Pac. 37, which was an action to condemn the riparian rights of the appellants under the Oregon act of 1891, the court said: "The first section of the act expressly declares that the use of the waters of this state for the purposes specified in the act is a public use, and the right to collect rates or compensation for such use of said water is a franchise. The legislature has the sole power to determine when and in what cases the power of eminent domain may be exercised and private property taken, subject only to two limitations. One is, that it cannot be taken for private use, and the other is that compensation must be made before it is taken, unless in case of the state. The legislature having declared the use of water for the purposes named in the act to be a public use, this court cannot, from any-

A statute providing for the condemnation of land for irrigation purposes upon the payment of due compensation has been held to include also the condemnation of the right of the landowner to the water flowing through his lands upon the payment of due compensation therefor.[22]

The complaint in an action by an irrigation company to condemn water rights and land must show that the use for

thing that appears in this case, say that that declaration is not true. There are, however, examples to be found in the books where the courts have interfered and declared acts of the legislature violative of the constitution because they plainly undertook to appropriate the property of the citizen to private and not to public uses; but to enable the court to do so, the case must be free from doubt. We cannot say from the facts before us that this case is of that character. It is well known that there are extensive tracts of arid land in eastern Oregon, unproductive and almost worthless without irrigation, but which could be made productive by the use of water. The reclamation of this class of lands is the object of the act in question, and we cannot say that it is misapplication of the power of eminent domain to accomplish such results. Doubtless, in some instances, it may be the means of causing riparian owners much inconvenience and expense and even loss, but these are some of the occasional consequences of such a law; but generally juries may be trusted in these matters. * * * We cannot reverse this judgment without overturning the act of the legislature under which the proceedings were taken, and we do not see our way clear to do this. The act is one that affects large property interests, the policy and scope of which may be of doubtful utility, but these are not enough to enable us to overthrow it. Before we could do that, it must plainly contravene some provision of the organic law, and we cannot find that it does. Still, it is an act the execution of which must be closely scrutinized by the courts, and all of its provisions construed strictly. Whoever claims anything by virtue of it must bring himself clearly within its terms." It is to be noticed that the Oregon act saves the right of a riparian owner to necessary water for his own uses.

22 McGhee Irr. Ditch Co. v. Hudson, 85 Tex. 587, 22 S. W. 398.

which the property is sought to be condemned is a public use, and must also specify with exactness the property and rights to be taken.[23]

§ 128. Acquisition of Right of Way.

Irrigation companies have the same rights as individuals in respect to the acquisition of a right of way for their ditches and other necessary works.[24] Thus, under the statutes, an irrigation company may condemn land for such purpose, the rights of the landowners being protected by provisions for due compensation, and by regulations so limiting the right of condemnation as to work no unnecessary injury upon them.[25]

The condemnation of land by an irrigation company for its ditch is a condemnation for a public use.[26] It is not neces-

[23] Aliso Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537.

[24] See, generally, ante, c. 4.

[25] Consult the statutes in Appendix. See Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802; San Luis Land, Canal & Imp. Co. v. Kenilworth Canal Co., 3 Colo. App. 244, 32 Pac. 860; Paxton & H. Irr. Canal & Land Co. v. Farmers' & Merchants' Irr. & Land Co., 45 Neb. 884, 64 N. W. 343, 50 Am. St. Rep. 585; Albuquerque Land & Irr. Co. v. Gutierrez (N. M., 1900) 61 Pac. 357. Under the California statutes, a ditch company incorporated in one county cannot maintain an action to condemn lands in another county in connection with water rights claimed therein, where the ownership of such property is denied, and the question of ownership is therefore raised in the case, without first filing a copy of its articles of incorporation in such county. Emigrant Ditch Co. v. Webber, 108 Cal. 88, 40 Pac. 1061.

[26] Paxton & H. Irr. Canal & Land Co. v. Farmers' & Merchants' Irr. & Land Co., 45 Neb. 884, 64 N. W. 343, 50 Am. St. Rep. 585; Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635. Where the statute provides that, before property can be taken for a public use, it must appear that

sary in a condemnation proceeding to secure such right of way for the irrigation company to show that it has condemned or purchased the water rights of the riparian owners along the stream which it proposes to tap,[27] though the power to condemn land may include also the power to condemn such water rights.[28]

§ 129. By-Laws and Regulations.

An irrigation company may undoubtedly adopt reasonable by-laws and regulations, so long as these are not in conflict with law; but a ditch company diverting water from a natural stream for general purposes of irrigation cannot, by any provision of its by-laws, rules or regulations, exempt itself or its stockholders from the operation of the constitution or laws of the state.[29] And a consumer under an irrigating ditch having an affirmative right under a statute to purchase water from the ditch, who has complied with the provisions of the statute, cannot be required, as a condition precedent to the exercise of his right, to acknowledge the equity of all the rules adopted by the ditch owner.[30] Nor can the constitutional right of individual consumers, upon tender of the

the taking is necessary for such use, and the question as to the necessity of the taking is submitted to a jury, the court cannot disregard their verdict, and find differently. Wilmington Canal & Reservoir Co. v. Dominguez, 50 Cal. 505. Ditches and canals constructed by an irrigation company may be designated by the legislature as "works of internal improvement." Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411.

27 Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635.

28 McGhee Irr. Ditch Co. v. Hudson, 85 Tex. 587, 22 S. W. 398.

29 Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966.

30 Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142.

regular rates, to water diverted by the carrier, be taken away or qualified by a by-law, providing that no water shall be sold from the company's ditch except to stockholders, thus compelling the applicant for water to purchase stock in the company as a condition precedent to receiving the water.[31] But where the corporation is organized for the sole purpose of supplying water to its stockholders, and not for the sale, rental or distribution of water to the public generally, a by-law that the water shall be sold to or used by stockholders only is valid.[32] The right of a customer to change the place of use of the water cannot be impaired or restricted by a by-law having that effect, unless such by-law was authorized by the company's charter, or was assented to by the consumer.[33] But while an irrigation company may not impose conditions that operate to deprive consumers of the enjoyment of their constitutional rights, it may require them to exercise such rights under reasonable regulations and limitations.[34]

§ 130. Irrigation Companies Public Carriers of Water.

Irrigation companies furnishing water to consumers for compensation, although private corporations, [35] are public or quasi public carriers of water, charged with a public duty

[31] Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966.

[32] McFadden v. Board Sup'rs Los Angeles County, 74 Cal. 571, 16 Pac. 397.

[33] Knowles v. Clear Creek, P. R. Mill & Ditch Co., 18 Colo. 209, 32 Pac. 279.

[34] Wright v. Platte Val. Irr. Co. (Colo. Sup., 1900) 61 Pac. 603.

[35] Corporations engaged in the business of furnishing water for irrigation, under the laws of California, whether they acquire the water by appropriation of the waters of the state or otherwise, are private corporations. San Diego Flume Co. v. Souther, 90

or trust.[36] As defined under the Colorado constitution, they exist largely for the benefit of others, being engaged in the business of transporting, for hire, water owned by the public, to the people owning the right to its use. They are permitted to acquire certain rights as against those subsequently diverting water from the same natural stream. They may exercise the power of eminent domain. Their business is affirmatively sanctioned, and their profits or emoluments are fully guaranteed by the protection afforded to their property and interests.[37] But as public carriers, and in consideration of this recognition, and the privileges and protection given, they are charged with certain duties towards the public, and are subject to a reasonable control by the state legislature,[38]

Fed. 164. In this case, with reference to the use of water when distributed by an irrigation company, the court said: "The use is public only to the extent that the corporation may be compelled to furnish the water, provided it has the capacity to do so, to all who receive and pay for the same, and that the rule of compensation shall be fixed by the law in case the parties cannot agree."

36 Atlantic Trust Co. v. Woodbridge Canal & Irr. Co., 79 Fed. 39, 501; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487; Junction Creek, etc., Ditch Co. v. City of Durango, 21 Colo. 194, 40 Pac. 356; Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 Pac. 444; Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. 144, reversing 1 Colo. App. 480, 29 Pac. 906; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635. A ditch used for the carriage of water for hire to the people generally is at least quasi public. Junction Creek, etc., Ditch Co. v. City of Durango, 21 Colo. 194, 40 Pac. 356. And the ditch company is a quasi public corporation. San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County, 90 Fed. 516.

37 Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487.

38 Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635.

and to the general irrigation laws.[39] As pointed out in a leading case, the Colorado doctrines of ownership and appropriation of water necessarily give the carrier of water an exceptional status, differing in some particulars from that of the ordinary common carrier. Certain peculiar rights are acquired in connection with the water diverted, which are dependent for their birth and continued existence upon the use made by the consumer.[40] The nature of these rights has been considered in a previous section.[41]

§ 131. Duty to Furnish Water to Consumers.

An irrigation company authorized to carry water for hire is charged with a corresponding duty to furnish such water to consumers in a proper case, and cannot arbitrarily refuse to supply an actual bona fide consumer, making seasonable application, and offering proper compensation therefor.[42] And a corporation charged with the duty of furnishing water to the public cannot escape the performance of this duty by asserting that it was also incorporated for some private purpose or purposes.[43] The fact that consumers have at times been permitted to use more water from the company's ditch than they were entitled to will not prevent them from main-

39 Munroe v. Ivie, 2 Utah, 535.

40 Wheeler v. Northern Colo. Irr. Co. 10 Colo. 582, 17 Pac. 487. See Wright v. Platte Val. Irr. Co. (Colo. Sup., 1900) 61 Pac. 603.

41 See ante, § 126.

42 McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142; Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966; Western Irr. & Land Co. v. Chapman (Kan. App., 1899) 59 Pac. 1098; and cases cited in note 56, infra.

43 Lanning v. Osborne, 76 Fed. 319; Price v. Riverside Land & Irr. Co., 56 Cal. 431; Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720.

taining their right to the water to which they are in fact entitled.[44]

It is provided by statute in Colorado that persons who have purchased and used water from a ditch or reservoir for the irrigation of their lands, and have not ceased to do so for the purpose or with intent to procure water from some other source of supply, shall have the right to continue to purchase water to the same amount on paying or tendering the price fixed by the county commissioners, etc.[45] This section confers an affirmative right upon the prior purchaser, who has complied with the provisions thereof, to continue his purchase of water, and he cannot be required, as a condition precedent to the exercise of this right, to acknowledge the equity of all the rules adopted by the ditch owner; nor does the fact that the consumer may be able to obtain water from some other source affect such right.[46]

One who has procured and used the water on his land for a single season may invoke the provisions of this statute in so far as to require the company to accord to him a preference to the same amount of water for subsequent years over new applicants.[47] The statute is simply an assurance of the right to continue, under specified circumstances, a use already enjoyed, and does not give one who has never had the use of the water a right thereto, and therefore does not repeal other provisions conferring such right.[48]

44 Larimer & Weld Irr. Co. v. Wyatt, 23 Colo. 480, 48 Pac. 528.

45 Mills' Ann. St. § 2297. A similar statute is in force in Idaho. Wilterding v. Green (Idaho, 1896) 45 Pac. 134.

46 Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142.

47 Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. 423.

48 Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487.

In California it is provided that whenever an irrigation corporation furnishes water to irrigate lands sold by it, the right to such water shall remain a perpetual easement to the land sold; and whenever any person cultivating land on the line, and within the flow of the corporation's ditch, has been furnished water by it for the irrigation of his land, he shall be entitled to the continued use of such water upon the same terms as those who have purchased their land from the corporation.[49] The fact that the owner of land lying under an irrigating ditch, by contract with the irrigation company, waived the provisions of this statute, and agreed to pay a higher rate than that charged other persons, does not affect his right to the continued use of the water at the regular rates after the expiration of his contract.[50] And a consumer whose land is situated within the flow of the distributing system of an irrigation company, and who has, by means of water thereby supplied to him, made valuable improvements on his land, cannot be thereafter lawfully deprived of such water in order that the distributor may supply later comers, even though a larger area, by reason of more favorable conditions, may thus be brought under cultivation.[51]

Persons having a prior right to receive water from an irrigating ditch may enjoin the company from furnishing water to later comers, so as to compel them to prorate with the latter.[52] So, also, stockholders in a mutual ditch com-

49 Civ. Code, § 552; Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720.

50 San Diego Land & Town Co. v. Sharp, 97 Fed. 394.

51 Mandell v. San Diego Land & Town Co., 89 Fed. 295; San Diego Land & Town Co. v. Sharp, 97 Fed. 394.

52 Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028; Wyatt v. Larimer & Weld Irr. Co., 18 Colo.

pany may enjoin the company from disposing of any of the water diverted to any other persons than bona fide stockholders in the corporation, where the effect of this would be to deprive them of some of the water to which they are entitled.[53] And an irrigation company is liable to a stockholder for injury occasioned by its permitting other stockholders to divert more water than they were entitled to under the terms of incorporation.[54]

In order to be entitled to water from an irrigating ditch, the consumer must make seasonable application therefor, and pay or tender the proper price for the same. And where an irrigation company has adopted a fair and reasonable rule as to the time before which the application must be made, it seems that a failure to make application by the time prescribed might result in a forfeiture of the statutory right to obtain the water, provided the water has in the meantime been disposed of to other persons. But no such forfeiture will result if application is afterwards made while the ditch owner is still free from conflicting obligations, and is able to grant the applicant's request.[55]

298, 33 Pac. 144; Brown v. Farmers' High Line Canal & Reservoir Co. (Colo. Sup.) 56 Pac. 183. In the case last cited it was held that stockholders of the defendant corporation whose priorities were subsequent to that of the plaintiff, and who claimed the right to a prorating by the latter, were necessary parties, and properly joined as defendants.

53 McDermott v. Anaheim Union Water Co., 124 Cal. 112, 56 Pac. 779. In this case the action was brought to enjoin the defendant company from furnishing water to new stockholders, also made defendants, to whom stock had been issued under a void amendment of the articles of incorporation.

54 O'Connor v. North Truckee Ditch Co., 17 Nev. 245, 30 Pac. 882.

55 Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142.

The delivery of water by an irrigation company to a person entitled thereto may be compelled by the writ of mandamus;[56] and the writ will lie to enforce a right to water where conferred by contract, as well as when conferred by statute.[57] The fact that the party applying for such writ may maintain an action for damages in case he should suffer injury in loss of his crops by reason of the company's failure to furnish water does not affect his right to the writ.[58] But before applying for a writ of mandamus, an express demand or request must be made on the company for the delivery of the water, which demand must be definite and specific. The preliminary demand, the prayer of the petition, and the judgment must be for the delivery of a specific quantity of water.[59]

It is no defense to mandamus proceedings to compel an

[56] Price v. Riverside Land & Irr. Co., 56 Cal. 431; Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487; Townsend v. Fulton Irr. Ditch Co., 17 Colo. 142, 29 Pac. 453; Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966; People v. Farmers' High Line Canal & Reservoir Co., 25 Colo. 202, 54 Pac. 626. See Wilterding v. Green (Idaho, 1896) 45 Pac. 134; Bright v. Farmers' High Line Canal & Reservoir Co., 3 Colo. App. 170, 32 Pac. 433.

[57] People v. Farmers' High Line Canal & Reservoir Co., 25 Colo. 202, 54 Pac. 626.

[58] Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142. But in Fulton Irr. Ditch Co. v. Twombly, 6 Colo. App. 554, 42 Pac. 253, it was held that the equitable remedy of a mandatory writ of injunction would not be granted to compel the delivery of water under a contract without an allegation of the insolvency of the defendant, or other ground for equitable relief, and the fact that growing crops would be lost unless the water was furnished would not confer equitable jurisdiction, for such loss is capable of compensation in damages, and so would not be irreparable injury.

[59] Price v. Riverside Land & Irr. Co., 56 Cal. 431.

irrigation company to furnish water to a consumer, that the defendant has not sufficient water to supply the plaintiff and others needing water, where there is no averment that such other persons have demanded or purchased water. Nor is the expected deprivation in the future of some of its water supply a defense, though such deprivation may be a defense when it occurs.[60]

The petition for a writ of mandamus must, of course, state all the facts necessary to justify granting the relief asked for,[61] but proceedings in such cases are necessarily somewhat summary in their nature. To be effective, the relief must be immediate, and hence trial courts should be liberal in matters of pleading and practice, lest the petitioner's crops should be lost by reason of a delay over legal technicalities.[62] The petition for the writ of mandamus and the affidavit in support thereof need not necessarily be separate papers. Since the petition itself must state all the facts required to be set out in the affidavit, it is a sufficient compliance with a statute requiring the filing of a petition and affidavit that the petition itself be verified.[63]

While the delivery of water may be compelled by the writ of mandamus, such writ is not an appropriate remedy to secure a perpetual right to the use of water for irrigation. The right of a consumer to water from the company's ditch can be only an annually recurring right, dependent, among other things, upon an annual tender of the charges.[64]

60 Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720.

61 Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487.

62 Townsend v. Fulton Irr. Ditch Co., 17 Colo. 142, 29 Pac. 453.

63 Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142.

64 Townsend v. Fulton Irr. Ditch Co., 17 Colo. 142, 29 Pac. 453. So,

An irrigation company which contracts to furnish water to a consumer, but negligently or willfully fails to furnish such water when it is its duty to do so, is liable to the consumer for damage suffered in the loss of crops by reason of such breach of contract.[65] And in such case, the company cannot excuse itself by showing that there was a scarcity of water in the stream from which its ditch was supplied, where the loss could have been prevented by the exercise of proper measures to utilize the water supply available. It must clearly appear that the failure to furnish water was chargeable to inevitable accident, and not to negligence and inattention.[66] The existence of an injunction restraining the company from diverting water from its source of supply has been held not a legal excuse for failure to deliver water according to contract.[67] But where the failure to furnish water is attributable to the insufficiency of the rainfall, from which source the canal was to be supplied, and not to any negligence or inattention of the company, the company is not liable; and in such case the consumer is not liable to the company for water rent.[68] Where, in an action against an

also, a final decree of a perpetual mandatory injunction to enforce the delivery of water under a contract is erroneous, and the life of the injunction should be made only coextensive with the existence of the contract. Fulton Irr. Ditch Co. v. Twombly, 6 Colo. App. 554, 42 Pac. 253.

[65] Sample v. Fresno Flume & Irr. Co. (Cal., 1900) 61 Pac. 1085; Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. 423; Pawnee Land & Canal Co. v. Jenkins,, 1 Colo. App. 425, 29 Pac. 381. See, also, Hewitt v. San Jacinto & P. V. Irr. Dist., 124 Cal. 186, 56 Pac. 893.

[66] Pawnee Land & Canal Co. v. Jenkins, 1 Colo. App. 425, 29 Pac. 381.

[67] Sample v. Fresno Flume & Irr. Co. (Cal., 1900) 61 Pac. 1085.

[68] Landers v. Garland Canal Co. (La., 1900) 27 So. 727.

irrigation company for failure to furnish water according to contract, the agreement to furnish water and the failure to do so are proved, it devolves upon the defendant to explain such failure, the sufficiency of the explanation offered being a question for the jury.[69]

In an action against an irrigation company for damages for loss of crops on account of the defendant's failure to furnish water, the measure of damages should be the actual injury suffered. Thus, the rental value of the land is not the proper measure of damages unless the owner is deprived of the entire use of the land. And where the loss of the use of the land is not entire, the allowance of the whole rental value, without deducting the benefits derived from the partial use, is erroneous. Where a partial crop is raised, the proper measure of damages is the difference between the amount realized from the crops produced from the land and the amount that would have been realized therefrom had the water been furnished, less the added cost of raising, harvesting and marketing the product. The loss of trees, seeds and labor may constitute a proper element of damage, but no compensation should be allowed for permanent improvements made on the land, and alleged to have become less valuable on account of the want of water, or for depreciation in the value of live stock and farming implements.[70]

The consumer's right to water dates from the time of demand and tender of the price, and hence, in an action for damages for failure to furnish water, the defendant company

69 Rocky Ford Canal, etc., Co. v. Simpson, 5 Colo. App. 30, 36 Pac. 638.

70 Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. 423.

is liable only for loss suffered after such demand and tender.[71]

132. Contracts for Water Rights.

Water is generally furnished by an irrigation company under written contracts with the consumers. Such contracts are, of course, subject to the usual rules of construction of contracts.[72] A contract by which an irrigation company promises to deliver to a consumer a certain quantity of water

[71] Western Irr. & Land Co. v. Chapman (Kan. App., 1899) 59 Pac. 1098.

[72] As to the construction of particular contracts, see Consolidated Canal Co. v. Peters (Ariz., 1896) 46 Pac. 74; Fresno Canal & Irr. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275; San Diego Flume Co. v. Chase, 87 Cal. 561, 25 Pac. 756, 26 Pac. 825; Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co., 120 Cal. 521, 52 Pac. 995; Hewitt v. San Jacinto & P. V. Irr. Dist., 124 Cal. 186, 56 Pac. 893; Sample v. Fresno Flume & Irr. Co. (Cal., 1900) 61 Pac. 1085; Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. 144, 23 Colo. 480, 48 Pac. 528; Wright v. Platte Val. Irr. Co. (Colo. Sup., 1900) 61 Pac. 603; Rockwell v. Highland Ditch Co., 1 Colo. App. 396, 29 Pac. 285; Brighton & N. P. Irr. Co. v. Little, 14 Utah, 42, 46 Pac. 268. See, also, Giddings v. 76 Land & Water Co., 109 Cal. 116, 41 Pac. 788. Where a landowner contracted with an irrigation company that he and his successors in interest should take water from the company at a certain price, payable annually, and that the contract and covenants therein contained should "run with and bind the land," it was held that such contract created a lien on the land for water furnished, which was binding on the landowner's successors in interest with notice thereof, though such covenants, not being contained in grants of the estate, did not run with the land so as to bind the successors in interest personally. Fresno Canal & Irr. Co. v. Rowell, 80 Cal. 114, 22 Pac. 53; Fresno Canal & Irr. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275.

Where a contract between an irrigation company and consumers under its ditch provided that the company should turn the ditch over to the owners of the water rights when the number of water

annually, upon the annual payment of a specified consideration therefor, constitutes a mere option, which may be terminated by the consumer at the end of any year; and when the consumer causes the county commissioner to fix a rate for the delivery of water from the company's ditch, and declines to pay the price named in the contract, he thereby terminates the contract.[73] A provision in such contract that, upon failure to pay the annual charge specified, the consumer forfeits and relinquishes all rights and claims whatsoever in and to the use of the water from the ditch, applies only to the rights and claims given by the contract, and not to the consumer's constitutional or statutory right to obtain water from the ditch.[74]

Contracts by an irrigation company to dispose of water in excess of its ability to furnish water are unfair and illegal; and parties having a prior right to take water from the company's canal may enjoin the company from selling additional water rights beyond the capacity of the canal, so as to endanger their own supply, and compel them to pro rate with the new comers.[75] A provision in a contract between a

rights sold and in force should equal the "estimated capacity of the company's canal to furnish water," it was held that this clause should be construed as having reference to the water supply, as well as to the physical capacity of the ditch. Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. 144, 23 Colo. 480, 48 Pac. 528. As to a similar contract, see La Junta & Lamar Canal Co. v. Hess, 6 Colo. App. 497, 42 Pac. 50.

73 South Boulder & R. C. Ditch Co. v. Marfell, 15 Colo. 302, 25 Pac. 504.

74 Id.

75 Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028; Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. 144. See, also, Lanning v. Osborne, 76 Fed. 319, and ante, § 131.

ditch company and a consumer that if, at any time, the company should fail or refuse to furnish water according to the contract, the consumer might take it himself from the company's ditch, has in Colorado been held void on the ground that such a provision is inconsistent with the state statute providing that the distribution of water from a canal shall be under the control of a superintendent appointed by the ditch company.[76] And it seems that such provision would be void and inoperative for the further reasons that it confers a right incompatible with the right of control incident to the right of property, and also because it is against public policy, as tending to confusion and breach of the peace, in allowing claimants to take whatever water they required, regardless of the rights of others having the same legal right.[77]

The decisions of state courts as to the validity of contracts between irrigation companies and consumers, made under the irrigation laws of the state, are binding on the federal courts.[78] A court of equity will not interfere to decree the cancellation of a contract to furnish water unless facts are alleged in the bill showing the necessity of equitable interference.[79]

§ 133. Rates for Furnishing Water.

The owners of irrigating ditches and canals are, of course, entitled to a reasonable compensation for furnishing water

[76] White v. Farmers' High Line Canal & Reservoir Co., 22 Colo. 191, 43 Pac. 1028, affirming 5 Colo. App. 1, 31 Pac. 345.

[77] It was on these grounds that the court of appeals held the provision void.

[78] San Diego Flume Co. v. Souther, 90 Fed. 164.

[79] Id.

to consumers.[80] As we have seen, an irrigation company furnishing water to consumers for hire is a public carrier, and charged with a public duty or trust, and is therefore subject to the control of the state through the legislature or courts.[81] Among the most important of the matters in which such companies are subject to control is the question of the rates to be charged for delivering water. Even where the state constitutions or statutes are silent as to the amount of the charge for transportation of the water, and the time and manner of its collection, it seems that the demands of the company in these respects must be reasonable. In voluntarily engaging in the business of carrying water as a public agency, in the absence of any legislation on the subject, an irrigation company must be held to have submitted itself to a reasonable judicial control in the matter of regulations and charges, and any attempt by it to use the monopoly of business along the line of its canal which it usually has for the purpose of coercing compliance with unreasonable and exorbitant demands would lay the foundation for judicial interference.[82]

In several states it is provided by constitution or statute, or both, that the boards of county commissioners shall fix the

80 Wilterding v. Green (Idaho, 1896) 45 Pac. 134. Where, in an action by an irrigation company to recover the contract price of water furnished by it, the plaintiff proves that the water was supplied at the place agreed upon, a refusal to permit the defendant to prove that the plaintiff so negligently and unskillfully constructed its ditch as to amount to a failure to perform its part of the contract, and so as to injure the defendant's land, is proper, such evidence being wholly immaterial. Fresno Canal & Irr. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275.

81 See ante, § 130.

82 Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487.

maximum rates to be charged for the carriage of water, whether furnished by individuals or corporations.[83] Where the state constitution provides that the legislature shall provide by law the manner in which maximum rates may be established, the legislature must provide by law the manner in which such rates shall be established, and it cannot itself fix the rates to be charged.[84] Under a provision that any party or parties interested in procuring water may petition the county commissioners to establish a maximum rate, it is not necessary that all consumers using or seeking water from the same carrier should join in the petition. Nor need the petitioners have been consumers from the company's ditch, for persons who have never been consumers therefrom have a right, under such provision, to petition for the establishment of a maximum water rate, and take advantage thereof, if the water diverted by the carrier be not exhausted.[85]

Under the Colorado constitution, the county commissioners have power only to fix the maximum amount of the rate to be charged for the use of water, and are not authorized to establish the exact rate to be charged, or to specify either

[83] See statutes, etc., in Appendix. The Colorado act providing for the fixing of water rates by the county commissioners (Mills' Ann. St. §§ 2295, 2296) is constitutional. Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142. In this case Helm, J., said: "If these persons or corporations [engaged in the business of furnishing water] were entirely uncontrolled in the matter of prices, it requires no prophetic vision to see that injustice and trouble would follow. If allowed to speculate upon that which is properly a part of the public domain, and protected in the possession thereof, it is exceedingly appropriate that they should be subjected to reasonable regulations in connection therewith."

[84] Wilson v. Perrault (Idaho, 1898) 54 Pac. 617.

[85] South Boulder & R. C. Ditch Co. v. Marfell, 15 Colo. 302, 25 Pac. 504.

the time or conditions of payment, though it seems that the time and conditions of payment are proper subjects for legislation.[86]

The rates fixed by the board of county commissioners must be reasonable and just. An irrigation company is not subject to such unreasonable regulations as to rates as would prevent it from earning a reasonable profit on its investment, and so amount to a taking of its property without due process of law, and a denial to it of the equal protection of the laws. And should the rates fixed be so low as to have this effect, a suit will lie in a federal court to restrain the enforcement of such rates.[87]

It is provided by the California constitution that the use of water appropriated for sale, rental or distribution is a public use, subject to the regulation and control of the state; and that the rates of compensation to be collected for the use of water supplied to any city, county or town, or the inhabitants thereof, shall be annually fixed by the governing board of the city, county or town.[88] A foreign corporation coming into the state and acquiring water rights under the constitution and laws thereof will not be permitted to assail these provisions as being contrary to the provisions of the constitution of the United States. It is not precluded, however, from questioning the reasonableness of the rates established by the municipality.[89] And it is within the scope of judicial power, and a part of judicial duty,

86 Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487.

87 San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County, 90 Fed. 516.

88 Const. art. 14, § 1.

89 San Diego Land & Town Co. v. City of National City, 74 Fed. 79.

to inquire whether rates so established operate to deprive the ditch owner of his property without just compensation; and if the court finds from the evidence that the rates are manifestly unreasonable, it is its duty to annul them.[90] The basis upon which to compute the rates is the actual present value of the property, and not its original cost, due regard being had to the cost of maintenance, depreciation by reason of wear and tear, and to the rights of the public.[91]

In Idaho the district court is authorized by statute to determine, under all circumstances, what is a reasonable compensation, and what are reasonable terms, for the use of water, either annually or for a term of years.[92]

In Colorado the statutes provide for no appeal from the decision of the county commissioners fixing water rates.[93] Under the California act, however, it seems that, should the rates fixed by the board designated by the law for this purpose be so unreasonable as to justify the interposition of a court, any party aggrieved would have his remedy in the appropriate court, by which such unreasonable rates would be annulled and the question again referred to the board.[94]

Notwithstanding the existence of a statute providing for the establishment of rates by the county commissioners, until such rates are fixed in pursuance of law, an irrigation company and consumers under its ditch are free to make such

[90] Id.

[91] Id. See, also, that these elements should be considered, Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487; Wilson v. Perrault (Idaho, 1898) 54 Pac. 617.

[92] Wilterding v. Greene (Idaho, 1896) 45 Pac. 134.

[93] Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142.

[94] Lanning v. Osborne, 76 Fed. 319.

contracts as they may see fit, and their agreements will be sustained by the courts.[95] If the carrier has a rate of its own, with which the consumer is satisfied, no necessity exists to apply to the commissioners to fix a maximum rate.[96] Moreover, the action of the commissioners in fixing rates does not prevent consumers from making special contracts with the carrier regarding the rate, or from continuing under pre-existing agreements.[97]

The provisions of the California constitution and act of 1885, providing for the fixing of water rates by the board of supervisors, does not authorize such board to fix such rates where the water is furnished exclusively to stockholders of the corporation, and not sold, rented or distributed to the public generally.[98]

Where an irrigation company is authorized to charge a

95 San Diego Flume Co. v. Souther, 90 Fed. 164. The California act of March 12, 1885, § 5, provides that, until water rates are fixed as provided by law, the actual rates established and collected by the irrigation companies, etc., shall be deemed and accepted as the legal rates. Under this section it is held that an irrigation company is not estopped from raising its rates by the fact that before the passage of the statute it contracted to furnish water at a certain rate; for persons who bought land or otherwise acted or contracted with reference to such rate must be held to have known that the constitution conferred upon the legislature the power and made it its duty to prescribe the manner in which such rates should be established. Lanning v. Osborne, 76 Fed. 319. As to suits by the receiver of a water company to establish his right to fix rates, see Lanning v. Osborne, 79 Fed. 657; Ward v. San Diego Land & Town Co., 79 Fed. 665.

96 Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487.

97 San Diego Flume Co. v. Souther, 90 Fed. 164; South Boulder & R. C. Ditch Co. v. Marfell, 15 Colo. 302, 25 Pac. 504.

98 McFadden v. Board Sup'rs, Los Angeles County, 74 Cal. 571, 16 Pac. 397.

certain maximum rate for the carriage or use of water, it cannot exact an additional amount as a bonus or royalty as a condition precedent to furnishing water to consumers under its ditch.[99]

§ 134. Transfer of Stock in Irrigation Companies.

Some questions have been raised as to the rights of stockholders in an irrigation company in the water diverted by the company, and the effect of a transfer of stock as carrying the water right. In this connection it should be noted that where an irrigation company is organized for the purpose of supplying water to the public generally, as in the case of other corporations, a transfer of stock cannot operate to transfer the company's property. Corporate property cannot be transferred by members of the corporation, but only by the corporation acting as such. And in the case of irrigation companies, the ownership of stock in the corporation is essentially different from the ownership of a prior right to the use of water from the company's ditch. The ownership of the stock, like the title to other property, may be acquired by descent or purchase; but the ownership of the prior right can be acquired originally only by the actual beneficial use of the water. A stockholder who makes an actual application of water from the company's ditch to beneficial use may thereby acquire a prior right thereto; but his title to the stock without such use gives him no title to the priority. He may transfer his stock to whom he will, but he can transfer his priority only to some one who will continue to use the water.[100]

[99] San Diego Land & Town Co. v. City of National City, 74 Fed. 79; Lanning v. Osborne, 76 Fed. 319; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487; Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. 423.

[100] Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966.

But where an irrigation company is organized as a mutual ditch company for the purpose of supplying water to stockholders only, and the corporation issues to consumers capital stock representing not only the interest of stockholders in the ditch, but also the right to the use of the water, then a transfer of such stock operates as a transfer of both the interest in the ditch and the right to the use of the water, represented by the stock transferred.[101] Where the shares of stock issued represent water rights, a transfer of such stock will carry the water rights represented thereby, and may operate to sever the water rights from the land in connection with which they were acquired.[102]

Shares of stock in an irrigation corporation are not appurtenant to the land owned by the owner of the shares, even though such land be irrigated by water from a canal owned by the corporation. Such shares, therefore, do not pass with the land on execution sale thereof, but can be taken for debt, under attachment or execution, only in the manner provided by law.[103] In Utah, by statute, water stock in an incorporated irrigation company is personal property, which may be transferred by assignment in writing and by delivery of the certificate of stock.[104]

101 Cache La Poudre Irr. Co. v. Larimer & Weld Reservoir Co., 25 Colo. 144, 53 Pac. 318. See, also, Spurgeon v. Santa Ana Val. Irr. Co., 120 Cal. 71, 52 Pac. 140; Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. 691.

102 Openlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854.

103 Wells v. Price (Idaho, 1899) 56 Pac. 266. See, also, Struby-Estabrook Merc. Co. v. Davis, 18 Colo. 93, 31 Pac. 495.

104 Snyder v. Murdock (Utah, 1899) 59 Pac. 91.

CHAPTER XIV.

IRRIGATION DISTRICTS.

§ 135. Generally.
136. Organization of District.
137. Corporate Nature of Irrigation Districts.
138. Powers and Duties of Board of Directors.
139. Issuance of Bonds and Levy of Assessments.

§ 135. Generally.

In several of the arid states it has been found that, where irrigation is conducted by individual farmers or corporations acting independently, and each seeking to promote his or its own interests alone, the best results are not obtained. In order to reconcile the various conflicting interests, and to establish a more efficient system of irrigation, statutes have been passed in these states providing for the organization and government of "irrigation districts," which are public corporations empowered to construct the best possible system of irrigation for the lands embraced within their borders. The best-known statute on the subject is the California statute, known as the "Wright Act," passed in 1887. This act has been several times amended, and was finally repealed, and a new statute on the subject passed in 1897.[1]

Statutes modeled on the Wright act have been passed in

[1] For the complete text of the various California statutes relating to irrigation districts from 1872 to 1897, see Gen. Laws 1899, pp. 436-548. The statutes are of very great length, and provide a most elaborate system for the organization and government of irrigation districts, the acquisition and construction thereby of irrigation works, and the distribution of water for irrigation purposes.

Idaho,[2] Kansas,[3] Nebraska,[4] Nevada[5] and Washington.[6] For a time, a similar statute was in force in Utah, but this has been repealed.[7]

The constitutionality of the act providing for the formation of irrigation districts has been assailed on various grounds, but has been uniformly upheld by the courts.[8]

The remaining sections of this chapter will be devoted mainly to an examination of the California system.

§ 136. Organization of District.

Irrigation districts are organized under the statute now in force in California substantially as follows: A majority of the owners of lands susceptible of irrigation from a common source, and by the same system of works, representing a majority in value of such lands, may propose the organization of a district. A petition praying for the organization of the district is addressed to the board of supervisors of the county in

2 Laws 1899, p. 408, repealing the earlier act of March 9, 1895.

3 Gen. St. 1899, §§ 3575-3598.

4 Comp. St. 1899, §§ 5511-5574.

The Nebraska act is copied in all essential features from the California act, and its enactment must be construed as a legislative approval of the interpretation given it in the latter state. Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086.

5 Comp. Laws 1900, §§ 374-423.

6 Bal. Code, §§ 4166-4249.

7 Comp. Laws 1888, §§ 2403-2427; Rev. St. 1898, §§ 1287, 1288; Harris v. Tarbet (Utah, 1899) 57 Pac. 33.

8 Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56; Herring v. Modesto Irr. Dist., 95 Fed. 705; Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379; Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825; Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106; In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354; Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086.

which the lands within the proposed district, or the greater portion thereof, are situated. The petition is required to be accompanied by a bond, to be approved by the board of supervisors, binding the sureties thereon to pay all the costs in case the organization of the district is not effected. The board of supervisors are required to set a day for the hearing of the petition, and, if the petition complies with the statutory requirements, an election is ordered to determine whether or not the proposed district shall be organized, and for the election of a board of directors and other officers. The election is conducted as nearly as practicable according to the general election laws of the state, and only persons qualified as electors under such laws are entitled to vote. If at least two-thirds of all the votes cast are in favor of the district, the board shall declare the district duly organized as such under the name designated, and the persons receiving the highest number of votes duly elected as officers. Provision is made for contesting the validity of such election.[9]

Proceedings for the formation of irrigation districts are to be liberally construed, so as to carry out the purposes of the law.[10]

By the act of 1887, the petition was required to "set forth and particularly describe the proposed boundaries" of the district.[11] It has been held that this provision probably re-

[9] Act 1897, §§ 1-12; Gen. Laws Cal. 1899, pp. 462-467. See Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106; Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. 794; Cullen v. Glendora Water Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047; In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354.

[10] Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825.

[11] The act of 1897 provides that the petition "shall set forth the boundaries of the proposed district," etc.

quires a description by metes and bounds, but that a description by metes and bounds that would be sufficient in an ordinary deed is a compliance with the statute.[12] The provision does not require that the boundaries shall be set forth and described with greater particularity than would be necessary in an act of the legislature creating a political district or a municipal corporation.[13]

Where the bond presented with the petition, although informal, is not invalid, and binds those who have signed it, the determination by the board of supervisiors of its sufficiency is conclusive.[14] And the board has power, in case such bond is defective, to allow a new bond to be filed before taking action on the petition.[15]

The board of supervisors has power, on the final hearing of the petition, to make such changes in the proposed boundaries of the district to be organized as may be deemed advisable, and they shall define and establish such boundaries; but the board shall not modify the proposed boundaries so as to exclude from the district any land which is susceptible of irrigation from a common source, and by the same system of works applicable to the other lands in such district; nor shall any lands which will not, in the judgment of the board, be benefited by irrigation by means of such system of works, be included within the proposed district. Any person whose lands are susceptible of irrigation from the same source and

12 Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825. See Cullen v. Glendora Water Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047.

13 In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106.

14 Id.

15 Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825.

system of works may, upon his application, in the discretion of the board, have such lands included within the proposed district.[16] The extent of the district, as well as the lands to be included therein, is left to the determination and discretion of the board of supervisors, and the exercise of their discretion in the matter cannot be reviewed by the courts.[17] The fact that a town or city is included within the boundaries of a district does not invalidate the organization of the district.[18] Nor is it any objection to the validity of the organization of the district that some of the land included is public land.[19] Provision is made by the statute for changing the boundaries of districts already organized by the exclusion or inclusion of lands.[20] The act provides for general elections of officers after the organization of the district.[21]

§ 137. Corporate Nature of Irrigation Districts.

Irrigation districts have been called municipal corporations,[22] but this designation was perhaps not used advisedly,

[16] Act 1897, § 2.

[17] Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825; Board of Directors Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106; Cullen v. Glendora Water Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047.

[18] Board of Directors Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106.

[19] Cullen v. Glendora Water Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047.

[20] Act 1897, §§ 74-97.

[21] Act 1897, §§ 19-28. As to salaries of officers, see Mitchell v. Patterson, 120 Cal. 286, 52 Pac. 589.

[22] Herring v. Modesto Irr. Dist., 95 Fed. 705.

as intended to distinguish municipal from public corporations. At any rate, it has been expressly held that an irrigation district is not a municipal corporation, within the meaning of a constitutional provision that "no county, city, town, school district, or other municipal corporation" shall incur an indebtedness to an amount exceeding five per cent of its taxable property.[23]

But if not a municipal corporation, it is well settled that an irrigation district is a public corporation, having for its object the promotion of the public welfare, and its officers are public officers of the state.[24] This will appear from an examination of the mode of its organization, the purpose for which it is organized, and the powers conferred upon it.[25]

23 Board of Directors Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. 995.

24 Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56; Herring v. Modesto Irr. Dist., 95 Fed. 705; Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379; Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825; Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106; People v. Turnbull, 93 Cal. 630, 29 Pac. 224; People v. Selma Irr. Dist., 98 Cal. 206, 32 Pac. 1047; Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514; Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. 908; Perry v. Otay Irr. Dist., 127 Cal. 565, 60 Pac. 40; People v. Linda Vista Irr. Dist. (Cal., 1900) 61 Pac. 86; Lincoln & Dawson Co. Irr. Dist. v. McNeal (Neb., 1900) 83 N. W. 847.

25 In Re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, in support of the proposition stated in the text, Harrison, J., said of an irrigation district organized under the California act: "It can be organized only at the instance of the board of supervisors of the county,—the legislative body of one of the constitutional subdivisions of the state; its organization can be effected only upon the vote of the qualified electors within its boundaries; its officers are chosen under the sanction and with the formalities required at all public elections in the state; * * * and the officers, when elected, being required to execute official bonds to the state of California, approved by a judge of the superior court. * * *

Being a public corporation, the validity of its organization cannot be collaterally attacked,[26] as in a suit to enjoin the sale of lands for assessments, by showing that the board of supervisors acted without their jurisdiction in effecting the organization of the district.[27] So, also, the irrigation district cannot plead the illegality of its own organization as a defense to an action on bonds issued by it.[28] Nor can such corporation be dissolved by the courts for a misuser or nonuser of its corporate powers, in the absence of a law specially conferring this power upon the courts.[29] But although a public or quasi public corporation, an irrigation district is not clothed with the sovereignty of the state, and laches may be imputed to it.[30]

§ 138. Powers and Duties of Board of Directors.

The statute provides for the organization and meetings of the board of directors. The board of directors have the power, and it is their duty, to manage and conduct the business and affairs of the district, make and execute all necessary contracts, and employ and appoint such agents, officers and employes as may be required, and prescribe their duties. They may enter upon any land to make surveys, and may lo-

The property held by the corporation is in trust for the public, and subject to the control of the state. Its officers are public officers, chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public."

26 Miller v. Perris Irr. Dist., 85 Fed. 693, 92 Fed. 263; People v. Linda Vista Irr. Dist. (Cal., 1900) 61 Pac. 86.

27 Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514. See, also, Miller v. Perris Irr. Dist., 85 Fed. 693.

28 Herring v. Modesto Irr. Dist., 95 Fed. 705.

29 People v. Selma Irr. Dist., 98 Cal. 206, 32 Pac. 1047.

30 People v. Jefferds, 126 Cal. 296, 58 Pac. 704.

cate the necessary irrigation works, canals, etc., on any lands which may be deemed best for such location. They may acquire, either by purchase or condemnation,[31] or other legal means, all lands and water rights or other property necessary for the construction, supply, etc., of the canals and other works. They may construct the necessary works for the collection of water for the district, and do any and every lawful act necessary to be done, that sufficient water may be furnished to each landowner in the district for irrigation purposes. The board is authorized and empowered to take conveyances or other assurances for all property acquired by it under the act, in the name of the irrigation district, to and for the uses and purposes named in the act. It is their duty to establish equitable by-laws, rules and regulations for the distribution and use of water among the landowners, and they have power generally to perform all such acts as may be necessary to fully carry out the purposes of the act.[32]

The statute provides that the board of directors shall be authorized and empowered to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of the act, or to enforce, maintain, protect or preserve any and all rights, privileges and immunities created by the act, or acquired in pursuance thereof. And in all courts, actions, suits or proceedings, the board may sue, appear and defend in person or by attorneys, and in the name of the irrigation district.[33] Under these provisions it is held that an irrigation district may be sued, the language employed being quite as effective to sub-

31 As to the condemnation of land for a right of way for a pipe line, see Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484.

32 Act 1897, §§ 13-16.

33 Act 1897, § 15.

ject the district to an action as the more common expression "to sue and be sued."[34]

Under the provisions of the Utah act of 1884, in respect to irrigation districts, after a district has been once organized, the boundaries determined, and the trustees elected, it becomes their duty to assume jurisdiction of the whole district. They cannot arbitrarily assume the management of part of the district and reject another part; and mandamus will lie to compel them to perform their duty under the law.[35]

§ 139. Issuance of Bonds and Levy of Assessments.

For the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of the statute, the board of directors of irrigation districts are required, as soon as practicable after the organization of the district, and whenever necessary thereafter, to determine the amount of money necessary to be raised. Then, upon the petition of a majority of the landowners in the district, an election shall be ordered, and the question of issuing bonds be submitted to the electors of the district. If a majority of the votes are cast in favor of issuing bonds, the board are required to cause bonds of the stated amount to be issued.[36] Before calling for an election on the question of issuing bonds,

34 Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. 908; Hewitt v. San Jacinto & P. V. Irr. Dist., 124 Cal. 186, 56 Pac. 893. See this case as to liability of irrigation district for failure to furnish water.

35 Harris v. Tarbet (Utah, 1899) 57 Pac. 33. This act has been repealed, but its provisions remain in force as to all districts organized thereunder prior to the repeal.

36 Act 1897, §§ 30-32. See Hughson v. Crane, 115 Cal. 404, 47 Pac. 120. See as to issue of bonds and use of the same for acquiring

the board of directors must make the estimate, as required by the statute, of the amount of money necessary to be raised, and to this end they must have adopted some plan for the acquisition and distribution of water. There can be no estimate where no such definite plan has been adopted.[37]

The bonds issued and the interest thereon are to be paid by revenue derived from an annual assessment upon the real property of the district, all of which property is liable to such assessment. Additional assessments may be levied to raise money for the completion of the plan of canal and works adopted, in case the money derived from the issue of bonds be insufficient or unavailable, the question of levying such additional assessments being also submitted to a vote of the electors of the district. Property assessed may be sold, subject to redemption, for the nonpayment of assessments levied.[38] An assessment levied for any purpose without being authorized by a vote of the electors of the district is illegal, and its collection cannot be enforced.[39]

and constructing irrigation works under the Nebraska statutes, Baltes v. Farmers' Irr. Dist. (Neb., 1900) 83 N. W. 83. As to action on bonds, see Shepard v. Tulare Irr. Dist., 94 Fed. 1; Herring v. Modesto Irr. Dist., 95 Fed. 705.

37 Cullen v. Glendora Water Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047.

38 See, generally, as to assessments, Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56; Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379; Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514; City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291; Cooper v. Miller, 113 Cal. 238, 45 Pac. 325; Hughson v. Crane, 115 Cal. 404, 47 Pac. 120; Lahman v. Hatch, 124 Cal. 1, 56 Pac. 621; Perry v. Otay Irr. Dist., 127 Cal. 565, 60 Pac. 40; State v. Brown, 19 Wash. 383, 53 Pac. 548.

39 Tregear v. Owens, 94 Cal. 317, 29 Pac. 643; Woodruff v. Perry, 103 Cal. 611, 37 Pac. 526.

Irrigation districts being public corporations, and the validity of their organization being therefore not subject to collateral attack,[40] it is immaterial, so far as the validity of an assessment levied by a district is concerned, whether such district be a corporation de jure or de facto.[41]

For the security of investors, and to enable irrigation districts to dispose of their bonds on advantageous terms, an act supplemental to the Wright act, and known as the "Confirmation Act," was passed in 1889, authorizing the board of directors to commence a special proceeding in the superior court of the county in which the lands of the district, or some portion thereof, were situated, in and by which the proceedings of the board and of the district, providing for the issue and sale of bonds, might be judicially examined, approved and confirmed.[42] By the act of 1897 it is provided that the board of directors may, at any time after the issue of any bonds, or the levy of any assessment, bring an action in the superior court of the county in which the office of the board is located, to determine the validity of any such bonds, or such levy of assessments. If no such proceeding is brought by the board, such action may be brought by any district assessment payer within thirty days after the levy of any assessment, or the is-

[40] See ante, § 137.

[41] Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514.

[42] St. 1889, p. 212. As to proceedings under this act, see Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797; Board of Directors Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237; Id., 164 U. S. 179, 17 Sup. Ct. 52; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106; Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. 794; Cullen v. Glendora Water Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047; In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354; People v. Linda Vista Irr. Dist. (Cal., 1900) 61 Pac. 86.

sue of any bonds.[43] The judgment of the court having jurisdiction of the confirmation proceedings as to the validity of the organization of an irrigation district, and other questions involved in the case, is conclusive as against the world until reversed on appeal or set aside by some direct proceeding instituted for that purpose.[44] The construction of the federal courts of the confirmation act, however, is not binding on the state courts.[45]

[43] Act 1897, §§ 68-73.

[44] Miller v. Perris Irr. Dist., 85 Fed. 693, 99 Fed. 143; Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797; Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484; People v. Linda Vista Irr. Dist. (Cal., 1900) 61 Pac. 86. In the case last cited it was held a judgment confirming the validity of the organization of an irrigation district was binding on the state.

[45] People v. Linda Vista Irr. Dist. (Cal., 1900) 61 Pac. 86.

CHAPTER XV.

THE DESERT LAND ACTS.

§ 140. The Acts of Congress.
141. The State Statutes.

§ 140. The Acts of Congress.

Congress has passed several acts providing for the reclamation and sale of desert lands belonging to the public domain. The first statute on the subject is the act of March 3, 1877.[1] This act provides "that it shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within a period of three years thereafter, provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irri-

[1] 19 Stat. 377; 1 Supp. Rev. St. U. S. p. 137.

gation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. Provided, that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form."

Sec. 2. "That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated."

Sec. 3. "That this act shall only apply to and take effect in the states of California, Oregon and Nevada, and the territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the commissioner of the general land office."

This act was amended by an act approved March 3, 1891,[a] and the following sections added:

[a] 26 Stat. 1095; 1 Supp. Rev. St. U. S. pp. 940, 941. On July 26,

Sec. 4. "That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements."

Sec. 5. "That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of the whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per

1894, an act was approved extending the time for making final proof and payment for all lands located under the homestead and desert land laws, proof and payment of which had not yet been made, for a period of one year from the time proof and payment would have become due under existing laws. 2 Supp. Rev. St. U. S. p. 205. The time was again extended by the act of August 4, 1894 (2 Supp. Rev. St. U. S. p. 224), which act also relieves from expenditure during the year 1894.

acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided, that proof be further required of the cultivation of one-eighth of the land."

Sec. 6. This section provides that existing claims may be perfected under the act of 1877, or under the new act.

Sec. 7. "That at any time after filing the declaration, and within a period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but

this section shall not apply to entries made or initiated prior to the approval of this act. Provided, however, that additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor shall be forfeited to the United States."

Sec. 8. This section extends the provisions of this and the former act to the state of Colorado, as well as the states originally named, and provides that "no person shall be entitled to make entry of desert land except he be a resident citizen of the state or territory in which the land sought to be entered is located."

By the "Carey Act" of August 18, 1894,[3] it was provided by congress "that to aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the secretary of the interior, with the approval of the president, be, and hereby is, authorized and empowered, upon proper application of the state, to contract and agree, from time to time, with each of the states in which there may be situated desert lands as defined by the" desert land act of March 3, 1877, and the amendatory act of March 3, 1891, "binding the United States to donate, grant and patent to the state free of cost for survey or price such desert lands, not exceeding one million acres in each state, as the state may cause to be irrigated, reclaimed, occupied, and not less than twenty acres

[3] 28 Stat. 472; 2 Supp. Rev. St. U. S. p. 259.

of each one hundred and sixty acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert land law."

"Before the application of any state is allowed or any contract or agreement is executed or any segregation of any of the land upon the public domain is ordered by the secretary of the interior, the state shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the secretary of the interior may make necessary regulations for the reservation of the lands applied for by the states to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any state contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the state shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement."

"As fast as any state may furnish satisfactory proof according to such rules and regulations as may be prescribed by the secretary of the interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the state or its assigns for said lands so reclaimed

and settled: Provided, that said states shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any state from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such state. That to enable the secretary of the interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any money in the treasury, not otherwise appropriated, one thousand dollars."

By an amendment to this act, passed June 11, 1896,[4] it was provided "that under any law heretofore or hereafter enacted by any state, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in" the above act, "a lien or liens is hereby authorized to be created by the state to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such state without regard to settlement or cultivation: Provided, that in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part."

[4] 29 Stat. 434; 2 Supp. Rev. St. U. S. p. 525.

§ 141. The State Statutes.

In several states, statutes have been passed accepting the conditional grant of arid land made by the Carey act.

Soon after the passage of the act, a statute was passed by the legislature of Montana for the purpose of enabling the state to accept the offer of the United States, and of reclaiming the arid lands within the state in accordance with the act of congress.[5] The statute provides for the creation of the "State Arid Land Grant Commission," to consist of five members, to be appointed by the governor. Each commissioner shall hold office for six years, and shall take an oath of office. The powers of the commission are extensive. They are given full power and authority to take all steps necessary to comply with the conditions of the act of congress, to the end that the state may receive the full benefit and advantage accruing to it from and by the terms of that act. It seems that the only limitation imposed by the statute on the extent to which the commission can go in their efforts to reclaim the arid lands donated to the state is that the steps taken, means used or contracts entered into shall be for the benefit of the state.[6]

This statute, by which the federal grant is accepted, and by which it is expressly provided that no debts or liabilities other than for limited incidental expenses of the commission can ever be created against the state under its provisions, is a valid legislative act, and such acceptance is valid. The state becomes the agent of the United States to make effective the

5 Pol. Code 1895, §§ 3530-3547.

6 State v. Marshall, 20 Mont. 510, 52 Pac. 268. See this case for an extended examination of the powers of the commission as to the lands that may be selected, issue of bonds, etc.

offer of the latter to part with its desert lands to the state or its assigns, provided the state can reclaim such lands, and induce the actual settlement and cultivation thereof. The state holds the legal title only for the benefit of real owners, actual settlers upon the land, irrigating and cultivating the same. The benefit to the state lies in the advantages of having such actual farmers. The state has the power to make contracts with individuals or corporations for placing the water upon the land, and may make contracts to sell with actual settlers. The state may thus earn the land for the benefit of actual settlers, provided it complies with the requirements of the acts of congress; but until it does so earn it, there is no transfer of title, and the state is expressly limited in its control and use of the land, and cannot dispose of the same in the manner provided by the constitution and laws of the state relative to public lands generally.[7]

A member of the commission is a state officer, with compensation fixed by law, and his claim for compensation is therefore not the subject of examination by the state board of examiners.[8]

Statutes similar to that of Montana accepting the congressional grant have been passed in Colorado,[9] Idaho,[10] Washington [11] and Wyoming.[12] In Colorado, Idaho and Wyoming the selection, management and disposal of the land is vested in the state board of land commissioners. In Washington this duty devolves upon the "commissioner of irrigation," but

7 State v. Wright, 17 Mont. 565, 44 Pac. 89.
8 Id.
9 3 Mills' Ann. St. §§ 3662a-3662x.
10 Laws 1895, p. 219; Laws 1899, p. 284.
11 Bal. Code, §§ 2085-2108.
12 Rev. St. 1899, §§ 934-967.

as no provision is made by law for the appointment of any such officer, it may be a question whether the act is not inoperative, unless the state land commissioner be considered as ex officio also commissioner of irrigation.

APPENDIX.

PREFATORY NOTE.

In the following pages are given the acts of congress and the constitutional and statutory provisions of the states and territories on the subject of irrigation. The more important statutes are given in full; statutes of less interest and importance being stated in substance or merely described. It will be found that many of the states have drawn largely from the statutes of California and Colorado, and for economy of space in some cases, statutes so copied have not been set out, but their provisions are indicated by reference to the model statute. Statutes already set out in the text of this work are not repeated in the Appendix. In few cases have the statutes as published been arranged according to any very logical system, and in the present work the order of the sections as published has generally not been followed, but a rough classification has been made.

TABLE OF CONTENTS.

Acts of Congress 311
Arizona 317
California 330
Colorado 341
Idaho 373
Kansas 377
Montana 387
Nebraska 397
Nevada 408
New Mexico 412
North Dakota 415
Oregon 419
South Dakota 431
Texas 434
Utah 447
Washington 454
Wyoming 467

ACTS OF CONGRESS.

GENERAL PROVISIONS.

[Priorities Recognized.]

Rev. St. U. S. § 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. [Act July 26, 1866.]

[Patents, etc., Subject to Existing Rights.]

§ 2340. All patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section. [Act July 9, 1870.]

INVESTIGATION, SURVEY, ETC., OF ARID LANDS.

The act of October 2, 1888, makes appropriation "for the

purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segegration of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation, and the prevention of floods and overflows, * * * the work to be performed by the geological survey, under the direction of the secretary of the interior. * * * And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes, and all the lands made susceptible of irrigation by such reservoirs, ditches or canals, are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject, after the passage of this act, to entry, settlement or occupation until further provided by law: provided, that the president may at any time, in his discretion, by proclamation, open any portion or all of the lands reserved by this provision to settlement under the homestead laws." [25 Stat. 505, par. 4; 1 Supp. Rev. St. U. S. 626.]

The act of March 2, 1889, provides for further appropriation for the purposes above stated, and that "the director of the geological survey, under the supervision of the secretary of the interior, shall make a report to congress on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoirs, and an itemized account of the expenditures under this and any future appropriation." [25 Stat. 939, par. 4; 1 Supp. Rev. St. U. S. 698.]

The provision of the act of October 2, 1888, as to reservation of land from sale, was repealed August 30, 1890, and it was provided that "all entries made or claims initiated in good faith, and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement, as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof. * * * Provided, that in all patents for lands hereafter taken up under any of the land laws of the United States, or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States." [26 Stat. 371, par. 4; 1 Supp. Rev. St. U. S. 791, 792.]

It was provided by the act of March 3, 1891, that reservoir sites located or selected and to be located and selected under the provisions of the act of October 2, 1888, and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said réservoirs. [26 Stat. 1095, § 17; 1 Supp. Rev. St. U. S. 945.]

Right of Way for Canals, Ditches and Reservoirs.

[Act March 3, 1891; 26 Stat. 1095; 1 Supp. Rev. St. U. S. 946.]

§ 18. That the right of way through the public lands and

reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation, and duly organized under the laws of any state or territory, which shall have filed or may hereafter file, with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch: provided, that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation; and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories.

§ 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the secretary of the interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which rights of way shall pass shall be disposed of subject to such rights of way.

Whenever any person or corporation, in the construction of any canal, ditch or reservoir, injures or damages the pos-

session of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

§ 20. That the provisions of this act shall apply to all canals, ditches or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the secretary of the interior, and with the register of the land office where such land is located, a map of the line of such canal, ditch or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: provided, that if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture.

§ 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance and care of said canal or ditch.

[Grant of Right of Way by Settler.]

Substitute for Rev. St. U. S. § 2288. Any bona fide settler under the pre-emption, homestead or other settlement

law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery or school purposes, or for the right of way of railroads, canals, reservoirs or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim. [Act March 3, 1891; 26 Stat. 1095, § 3; 1 Supp. Rev. St. U. S. 942, § 3.]

[Reservoir Sites.]

That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way act of March third, eighteen hundred and ninety-one. And any state is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the secretary of the interior may prescribe: provided, that the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective states and territories in which said reservoirs are in whole or part situate. [Act Feb. 26, 1897; 29 Stat. 599; 2 Supp. Rev. St. U. S. 563.]

DESERT LAND ACTS.

For these acts, see the text, chapter 15, § 140.

ARIZONA.

The statutes of Arizona consist of the earlier laws relating to acequias peculiar to Arizona and New Mexico, and several acts on the subject of appropriation, etc., modeled upon the statutes of California and other states.

[References to Rev. St. 1887.]

GENERAL PROVISIONS.

[Common Law Abolished.]

§ 3198. The common-law doctrine of riparian water rights shall not obtain or be of any force or effect in this territory.

[Streams Public Property.]

§ 3199. All rivers, creeks and streams of running water in the territory of Arizona are hereby declared public, and applicable to the purposes of irrigation and mining, as hereinafter provided.

§ 2863. All streams, lakes and ponds of water capable of being used for the purposes of navigation or irrigation are hereby declared to be public property; and no individual or corporation shall have the right to appropriate them exclusively to their own private use, except under such equitable regulations and restrictions as the legislature shall provide for that purpose. [Bill of Rights, § 22.]

[Taxation of Ditches.]

Water ditches constructed for mining, manufacturing or

irrigating purposes * * * must be assessed the same as real estate by the assessor of the county at a rate per mile for that portion of such property as lies within his county, and must be by him listed as a whole, without separating the land and franchise and improvements, either in the description or valuation of the same: provided, that private irrigating ditches, wholly owned by the parties using the water therefrom on their own lands, shall be exempt from assessment and taxation except in so far as such ditches enhance the value of the land upon which they conduct the water. [Act March 21, 1889; Acts 1889, p. 40. See, also, Act March 3, 1899; Acts 1899, p. 20.]

Irrigating Canals and Acequias.

[Vested Rights Protected.]

§ 3200. All rights in acequias or irrigating canals heretofore established shall not be disturbed, nor shall the course of the acequias be changed without the consent of the proprietors of such established rights.

[Right to Construct Acequias aud Appropriate Water.]

§ 3201. All the inhabitants of this territory who own or possess arable and irrigable lands shall have the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek or stream of running water.

[Damages for Construction of Acequias.]

§ 3202. Whenever such public or private acequias shall necessarily run through the lands of any private individuals not benefited by such acequias, the damages resulting to such

private individuals, on the application of the party interested, shall be assessed by the probate judge of the proper county in a summary manner.

[Obstruction of Irrigation Prohibited.]

§ 3210. In case a community or people desire to construct an acequia in any part of this territory, and the persons desiring to construct the same are the owners or proprietors of the land upon which they design constucting the said acequia, no one shall be bound to pay damages for such land, as all persons interested in the construction of said acequia are to be benefited thereby.

§ 3203. No inhabitant of this territory shall have the right to erect any dam, or build a mill or place any machinery, or open any sluice, or make any dyke, except such as are used for mining purposes or the reduction of metals, as provided for in sections six and seven of this chapter ([sections 3004, 3005], that may impede or obstruct the irrigation of any lands or fields, as the right to irrigate the fields and arable lands shall be preferable to all others; and the justices of the peace of the respective precincts shall hear and determine the question relative to all such obstructions in a summary manner, and cause the removal of the same by order directed to the constable of the precinct or sheriff of the county, who shall proceed to execute the same without delay.

[Damage from Mining Works.]

§ 3204. Where reduction works or other mining apparatus shall be placed upon lands previously held for agricultural purposes, the person or persons so holding such lands shall be entitled to remuneration from the person or persons erect-

ing or owning said reduction works or mining apparatus. The amount of remuneration shall be adjudged by three or five disinterested persons, or by the probate judge, as the parties interested shall agree, and in case such agreement cannot be made, then the party injured may bring suit for damages.

[Exclusive Right of Water Appropriated.]

§ 3205. When any ditch or acequia shall be taken out for agricultural purposes, the person or persons so taking out such ditch or acequia shall have the exclusive right to the water, or so much thereof as shall be necessary for said purposes, and if at any time the water so required shall be taken for mining operations, the person or persons owning said water shall be entitled to damages, to be assessed in the manner provided in section six of this chapter. [Section 3204.]

[Priority of Rights.]

§ 3215. During years when a scarcity of water shall exist, owners of fields shall have precedence of the water for irrigation, according to the dates of their respective titles or their occupation of the lands, either by themselves or their grantors. The oldest titles shall have precedence always.

[Private Acequia.]

§ 3225. Any person owning lands which may include a spring or stream of running water, or owning lands upon a river where there is not population sufficient to form a public acequia, may construct a private acequia for his own uses, subject to his own regulations, provided that it does not interfere with the rights of others.

[Ownership of Trees on Banks of Acequia.]

§ 3224. All plants and trees of any description growing

on the banks of any acequia shall belong to the owners of the land through which said acequia may run.

[Customs of Sonora.]

§ 3223. The regulations of acequias which have been worked according to the laws and customs of Sonora, and the usages of the people of Arizona, shall remain as they were made and used up to this day.

[Election of Overseers of Acequias.]

§§ 3211, 3212. These sections provide for the election of overseers of public acequias by the owners of lands irrigated by such acequias.

[Pay of Overseers.]

§ 3213. The pay and perquisites of said overseers shall be determined by a majority of the owners and proprietors of the lands irrigated by said acequias, and paid by them.

[Duties of Overseers.]

§ 3214. It shall be the duty of the overseers to superintend the opening, excavations and repairs of said acequias; to apportion the number of laborers furnished by the owners and proprietors; to regulate them according to the quantity of land to be irrigated by each one from said acequia; to distribute and apportion the water in proportion to the quantity to which each one is entitled, according to the land cultivated by him; and, in making such apportionment, he shall take into consideration the nature of the seed sown or planted, the crops and plants cultivated; and to conduct and carry on such distribution with justice and impartiality.

[Malfeasance or Nonfeasance in Office.]

§ 3217. This section prescribes a penalty for malfeasance

or nonfeasance in office by an overseer, and for his removal on a second conviction.

§ 3218. This section provides for the filling of vacancies caused by such removal.

[Duty to Labor on Public Acequias.]

§ 3207. All owners and proprietors of arable and irrigable land bordering on, or irrigable by, any public acequia, shall labor on such public acequia, whether such owners or proprietors cultivate the land or not.

§ 3208. All persons interested in a public acequia, whether owners or lessees of land, shall labor thereon in proportion to the amount of land owned or held by them, and which may be irrigated or subject to irrigation.

§ 3216. It shall be the duty of each of the owners and proprietors to furnish the number of laborers required by the overseer, at the time and place he may designate, for the purposes mentioned in the foregoing section [3215(?)] and for the time he may deem necessary.

§ 3219. If any owner or proprietor of land irrigated by such acequia shall neglect or refuse to furnish the number of laborers required by the overseer, as required in the 18th section of this chapter [section 3216], after having been duly notified by the overseer, he shall be fined for each offense in a sum not exceeding ten dollars, for the benefit of said acequia, which shall be recovered by the overseer before any justice of the peace of the county; and, in such cases, the overseer shall be a competent witness to prove the offense, or any fact that may serve to constitute the same.

[Bypaths Prohibited.]

§ 3206. All bypaths or footpaths across any cultivated

fields are prohibited, under penalty of a fine not to exceed ten dollars, for the benefit of the public acequia, to be assessed in a summary manner by the justice of the peace of the precinct; and if the person so offending shall not have wherewith to pay the fine, he shall be adjudged and sentenced to work ten days on the public acequia.

[Animals to be Kept under Shepherd.]

§ 3209. It being impracticable to properly inclose the fields in this territory, all animals shall be kept under a shepherd, so that no injury may result to the fields; and if any damage should result, it shall be paid by the owners of the animals causing the same, to be assessed by the justice of the peace of the precinct in a summary manner, and paid to the person or persons whose fields may have been damaged.

[Duty to Construct Crossings when Ditch Crosses Highway.]

§§ 3227-3230. These sections make it the duty of ditch owners to construct and maintain suitable crossings wherever their ditches cross public highways or roads, and provide a penalty for failure to do so.

THE APPROPRIATION OF WATER.

[Right to Appropriate Water.]

§ 1. Any person or persons, company or corporation, shall have the rig[illegible] to appropriate any of the unappropriated waters, or the surplus of flood waters, in this territory for delivery to consumers, rental, milling, irrigation, mechanical, domestic, stock or any other beneficial purpose, and such person or persons, company or corporation, for the purpose of making such appropriation of waters as herein specified, shall have the right to construct and maintain reservoirs, dams, canals,

ditches, flumes, and any and all other necessary waterways. And the person or persons, company or corporation, first appropriating water for the purposes herein mentioned shall always have the better right to the same. [Act April 13, 1893; Acts 1893, p. 119.]

[Duty of Appropriators as to Notice, etc.]

§ 2. Every person or persons, company or corporation, who shall desire to appropriate any of the waters of this territory for the uses and purposes mentioned in section 1 of this act shall first post at the place of diversion on the stream or streams, as the case may be, a notice of his, their or its appropriation of the amount of water by it or them appropriated, and that they intend to build and maintain a dam at a certain place, in said notice to be designated, and in case of storage of water by reservoir, that they intend to construct and maintain a reservoir at a place to be in said notice stated, and that they intend to construct and maintain a canal or canals, as the case may be, from the point of diversion of said water to some terminal point, to be mentioned in said notice, a copy of which shall be filed and recorded in the office of the county recorder, in which said dam, reservoir, and canal is contemplated to be constructed, and if said canal runs through more than one county, then such notices shall be filed and recorded in each county through which said canal is to be constructed, and a copy of said notice shall also be filed and recorded in the office of the secretary of the territory. That said person or persons, company or corporation, after posting and filing their notice as herein provided, shall, within a reasonable time thereafter, construct their dam or dams, reservoir or reservoirs, canal or canals, the case may be, and shall, after such construction, use reasonable diligence

to maintain the same for the purposes in such notices specified, and on failure, within a reasonable time after posting and filing of such notice or notices as herein provided, to construct such reservoir, dam or canal, as in such notice specified, or to use reasonable diligence, after such construction, to maintain the same, shall be held to work a forfeiture of such right to the water or waters attempted to be appropriated. [Act April 13, 1893; Acts 1893, p. 119.]

THE STORAGE OF WATER.

§ 1. That whenever storage reservoirs shall be constructed in the territory of Arizona, and water stored therein for subsequent distribution for irrigation or other useful purposes in times of shortage of water, that the owners of such reservoirs, and the water stored therein, shall have the right to make use of the natural channels of streams in this territory to conduct said waters to the place or places where they shall desire to use said waters, or have them used, and to divert the same from said natural channels at such places as shall be most convenient for said purposes.

§ 2. That in the event that the use of the waters which naturally flow in said channels shall have been previously appropriated by others, who have acquired the prior right to the use of them, then, and in such case, the owners of such reservoirs shall nevertheless have the right to make use of said natural channels without diminishing the quantity of water which naturally flows therein, and the use of which shall have been appropriated by others as aforesaid.

In cases where the parties interested cannot agree upon the division of the water turned into any natural channel from any storage reservoir from the water naturally flowing therein, and the use of which shall have been previously appro-

priated by others, and if there be any difficulty in ascertaining the several quantities to the use of which each party shall be entitled, then all the waters flowing in any natural channel shall be divided and distributed between the parties in interest in the manner following, to wit: There shall be ascertained the quantity of water which shall flow into said natural channel from the storage reservoir, and from that quantity there shall be deducted one-half of one per centum for each one mile of length of the natural channel through which said water shall flow before being diverted therefrom, and the owners of storage reservoirs, and those acting by their permission, shall have the right to divert from the natural channels the quantity of water which shall flow into the natural channel from the storage reservoir, after deducting therefrom said per centum thereof, and said prior appropriators of the water naturally flowing in said natural channels shall have the right to the use of all the remainder. [Act March 22, 1893; Acts 1893, p. 151.]

Irrigation Companies.

[Ditch Company not to Sell Water Beyond Capacity of Canal.]

§ 1. All corporations, associations, or individuals owning, managing, or controlling any canals, irrigating ditches, flumes, pipe lines or other means for conveying water from any public stream in this territory, or to the lands of occupants, for the purpose of selling, hiring or letting the same to such occupants for pay or hire, shall not sell, hire or let more water than said canals, ditches, flumes or pipe lines may be estimated to carry at any one time, whether such contract be made for measured, time or acreage quantity.

[Duty to Keep Ditch in Repair—Liability for Failure to Furnish Water.]

§ 2. This section provides that such persons, associations or corporations shall at all times keep their ditches, etc., in good repair and condition, so as to carry the full amount of water that such persons, etc., have contracted to carry and deliver, and that a failure to deliver the quantity of water contracted for (when there be sufficient in the stream or head) shall make such persons, etc., liable for all damages to the parties buying, hiring or renting water from said carriers.

[Repair of Ditches, etc., by Consumers.]

§ 3. This section provides that when the carrier shall permit its ditches, etc., to get out of repair or reduced in capacity, so that they will not carry the amount of water contracted to be delivered to consumers, and shall fail within a reasonable time to repair, cleanse or restore the same, then the consumers may do so, subject to certain restrictions, and the cost of such repairs, etc., shall be a lien on the canals or other works. [Laws 1893, p. 132.]

MISCELLANEOUS PROVISIONS.

[Repair of Lateral Ditches.]

It is provided that any person, firm or association owning an interest in common with another in any lateral ditch constructed and used for irrigating or other purpose shall have the right to widen, deepen, border up or extend such lateral ditch by paying to his or their associate or associates, and to the owners of the land through which said lateral passes, just compensation for damages. A lateral ditch is defined to be a private ditch leading out of a main ditch

or any of its branches taken from a river or original source of water supply. [Laws 1889, p. 42.]

[Opening Fences to Repair Ditches.]

It is provided that it shall be lawful to open any fence in order to repair any public ditch whenever it shall be necessary to use a team or wagon in repair of same, without the consent of the owner of said fence: provided, however, that the party or parties so opening the fence shall close it again, and shall be liable for all damages that may occur by reason of such opening and entry. [Laws 1893, p. 30.]

[Interfering with Acequia, etc.]

§ 3220. This section provides a penalty for interfering with, impeding or obstructing acequias, or unlawfully using water therefrom. See, also, sections 3221, 3222, and Pen. Code, § 841.

[Various Offenses.]

The following are declared to be misdemeanors: Failing to construct, maintain or repair bridges or crossings over acequias or canals when required by law to do so [Pen. Code, § 920]; allowing water to injuriously overflow highways [section 921]; unlawfully using water from any acequia or irrigating canal without the proper gates required by law [section 922]; unlawfully constructing or maintaining any dam, or in any way unlawfully impeding the free passage of the water in any irrigating canal or acequia [section 923]; failing to remove from the banks of irrigating canals all cockleburrs and sunflowers growing thereon before they ripen or mature their seed [Laws 1893, p. 23]; for any person using

water during the season when there is a scarcity of water for irrigation, to willfully waste the same, or willfully or knowingly to allow the same to run to waste, to the detriment or injury of any other person [Laws 1895, p. 117].

CALIFORNIA.

CONSTITUTIONAL PROVISIONS.

[Use of Water for Sale, etc., a Public Use—Regulation of Rates.]

Art. 14, § 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law: provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year, and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action, at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company or corporation collecting water rates in any city and county, or city or town, in this state, otherwise

than as so established, shall forfeit the franchises and waterworks of such person, company or corporation to the city and county, or city or town, where the same are collected, for the public use.

[Right to Collect Water Rates a Franchise.]

§ 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.

STATUTORY PROVISIONS.

The statutory provisions relating to irrigation consist principally of the following sections from the Civil Code, under the title "Water Rights," and the acts providing for the organization and government of irrigation districts. These provisions and acts have been used as models by the legislatures of several of the other states.

General Provisions as to the Right of Appropriation.

[Civil Code.]

[Water may be Appropriated.]

§ 1410. The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation.

[Appropriation must be for Useful Purpose.]

§ 1411. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.

[Place of Diversion and Use may be Changed.]

§ 1412. The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe line or aqueduct by which the diversion is made to places beyond that where the first use was made.

[Use of Natural Stream as Conduit.]

§ 1413. The water appropriated may be turned into the channel of another stream, and mingle with its water, and then reclaimed; but in reclaiming it, the water already appropriated by another must not be diminished.

[Priority of Appropriation.]

§ 1414. As between appropriators, the one first in time is the first in right.

[Notice of Appropriation to be Posted.]

§ 1415. A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein (1) that he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure; (2) the purposes for which he claims it, and the place of intended use; (3) the means by which he intends to divert it, and the size of the flume, ditch, pipe or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

[Construction of Works.]

§ 1416. Within sixty days after the notice is posted,

the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snows or rain: provided, that if the erection of a dam has been recommended by the California Debris Commission at or near the place where it is intended to divert the water, the claimant shall have sixty days after the completion of such dam in which to commence the excavation or construction of the works in which he intends to divert the water. [This proviso was added to the original statute as an amendment by an act approved March 23, 1895; St. 1895, p. 70.]

[Completion Defined.]

§ 1417. By "completion" is meant conducting the waters to the place of intended use.

[Doctrine of Relation.]

§ 1418. By a compliance with the above rules, the claimants' right to the use of the water relates back to the time the notice was posted.

[Forfeiture of Right.]

§ 1419. A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith.

[Rules Applicable to Existing Claims.]

§ 1420. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some

useful purpose, must, within twenty days thereafter, proceed as in this title provided, or their right ceases.

[Recorder to Keep Record Book.]

§ 1421. The recorder of each county must keep a book, in which he must record the notices provided for in this title.

[Riparian Rights Protected.]

§ 1422. The rights of riparian proprietors are not affected by the provisions of this title. [Repealed March 15, 1887; St. 1887, p. 114.]

REGULATION OF THE SALE AND DISTRIBUTION OF WATER.

Two acts have been passed relating to the regulation of the sale, rental and distribution of water for irrigation in the counties of the state, these acts being based upon the constitutional provisions given above. The first of these acts, approved March 26, 1880 [St. 1880, p. 16], entitled "An act authorizing the boards of supervisors of the counties in which water is sold for the purpose of irrigation to fix the rates at which such water shall be sold," embodies the constitutional provisions so far as these relate to counties, provides an action to enforce the forfeiture of franchises for collecting excessive rates, and also to compel the performance of their duty by the supervisors, and contains an additional provision that "no person, company or corporation selling water for irrigation shall be permitted to exercise any control as to the use of the water after its delivery to the purchaser."

The act of March 12, 1885 [St. 1885, p. 95], is more extensive, and provides as follows:

[Use of Water for Sale, etc., a Public Use.]

§ 1. By this section, the use of water appropriated for sale, rental or distribution is declared a public use, and the right to collect rates or compensation therefor a franchise, and except when furnished to a city, city and county, or town, or the inhabitants thereof, to be regulated and controlled in the several counties by the several boards of supervisors.

[Board of Supervisors to Fix Rates.]

§ 2. The boards of supervisors are by this section authorized and required, as provided by the act, to fix and regulate the maximum rates at which any person, company, association or corporation having or to have appropriated water for sale, rental or distribution in each of the counties, may and shall sell, rent or distribute the same.

[Petition to Fix Rates.]

§ 3. This section provides that whenever a written petition to regulate and control the rates and compensation to be collected for water, specifying the person, companies, etc., whose water rates are to be regulated or controlled, is filed with the clerk of the board of supervisors of any county by not less than twenty-five inhabitants of the county who are tax payers, such clerk shall cause the petition, together with a notice of the time and place of hearing thereof, to be published or posted as prescribed. The board may also cause citations to issue to any person or persons within the county to attend and give evidence at the hearing, and may compel such attendance by attachment.

[Value of Works to be Estimated at Hearing.]

§ 4. The board is required at the hearing to estimate

the value of the canals, etc., actually used and useful in connection with the appropriation and furnishing of the water, owned by the person, association, company or corporation whose franchise is to be regulated, and also all reasonable expenses for repairs, management and operation; and for this purpose they may require the attendance of witnesses and the production of documentary evidence.

§ 5. In the regulation and control of such water rates for each of such persons, companies, associations and corporations, such board of supervisors may establish different rates at which water may and shall be sold, rented or distributed, as the case may be; and may also establish different rates and compensation for such water so to be furnished for the several different uses, such as mining, irrigating, mechanical, manufacturing and domestic, for which such water shall be supplied to such inhabitants, but such rates as to each class shall be equal and uniform. [This section here prescribes the limits within which the rates are to be fixed, and the elements to be considered in establishing rates that shall be equal, reasonable and just to all parties.] The said rates, when so fixed by such board, shall be binding and conclusive for not less than one year next after their establishment, and until established anew or abrogated by such board of supervisors, as hereinafter provided. And until such rates shall be so established, or after they shall have been abrogated by such board of supervisors as in this act provided, the actual rates established and collected by each of the persons, companies, associations and corporations now furnishing, or that shall hereafter furnish, appropriated waters for sale, rental or distribution to the inhabitants of any of the counties of this state, shall

be deemed and accepted as the legally established rates thereof.

[Change of Rates.]

§ 6. This section provides that, after rates have been established by the board, they may be established anew, or abrogated in whole or in part, by such board, to take effect not less than one year next after such first establishment. The rates may be changed upon the written petition of the inhabitants, as before provided, or upon that of any of the persons, companies, etc., whose rates have been fixed and regulated.

[Record of Rates must be Published.]

§ 7. Boards of supervisors fixing and establishing originally or anew, or abolishing, rates, are required by this section to cause a record thereof to be made, and to publish or post the same as required in the case of petitions and notices.

[Duty to Furnish Water at Rates Established.]

§ 8. Any and all persons, companies, associations or corporations furnishing for sale, rental or distribution any appropriated waters to the inhabitants of any county or counties of this state (other than to the inhabitants of any city, city and county, or town therein) shall so sell, rent or distribute such waters at rates not exceeding the established rates fixed and regulated therefor by the boards of supervisors of such counties, or as fixed and established by such person, company, association or corporation, as provided in this act.

[Penalty for Collecting Excessive Rates.]

§ 9. This section provides that any person, company, etc., violating the provision of the preceding section by collecting excessive rates, shall be liable, in an action by the inhabitants so aggrieved, to a recovery of the whole rate so collected, together with actual damages sustained by such inhabitant, with costs of suit.

[Duty to Sell Water to all Persons Tendering Rates.]

§ 10. Every person, company, association and corporation, having in any county in the state (other than in any city, city and county, or town therein) appropriated waters for sale, rental or distribution, to the inhabitants of such county, upon demand therefor, and tender in money of such established water rates, shall be obliged to sell, rent or distribute such water to such inhabitants at the established rates provided and fixed therefor as in this act provided, whether so fixed by the board of supervisors or otherwise, to the extent of the actual supply of such appropriated waters of such person, company, association or corporation, for such purposes. If any person, company, association or corporation, having water for such use, shall refuse compliance with such demand, or shall neglect, for the period of five days after such demand, to comply therewith to the extent of his or its reasonable ability so to do, [such person, company, etc.] shall be liable in damages to the extent of the actual injury sustained by the person or party making such demand and tender, to be recovered, with costs.

[Condemnation of Right of Way.]

§ 11. This section provides for the condemnation of land and premises for right of way by persons, companies, etc., having the right to appropriate water.

[Private Contracts not Affected.]

§ 11½. Nothing in this act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations or corporations described in section two of this act, relating to the sale, rental or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract. [Section added March 2, 1897; St. 1897, c. 54.]

[Duty to Continue Furnishing Water.]

Civ. Code, § 552. Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land, on the line and within the flow of any ditch owned by such corporation, has been furnished water by it, with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation.

OFFENSES.

[Pen. Code 1899.]

[Unlawfully Taking Water from Ditch—Disturbing Headgate —Polluting Water.]

§ 592. Every person who shall, without authority of the owner or managing agent, and with intent to defraud, take water from any canal, ditch, flume or reservoir used

for the purpose of holding or conveying water for manufacturing, agricultural, mining, irrigating or generation of power for domestic uses, or who shall, without like authority, raise, lower or otherwise disturb any gate or other apparatus thereof used for the control or measurement of water, or who shall empty or place, or cause to be emptied or placed, into any such canal, ditch, flume or reservoir, any rubbish, filth or obstruction to the free flow of the water, is guilty of a misdemeanor. [Amendment approved March 20, 1899; St. 1899, c. 110.]

[Failure to Provide Fish Screen.]

§ 629. Ditch owners are required by this section to provide a wire screen at their headgates to prevent fish from entering the ditches, and failure to provide such screen is made a misdemeanor.

[Injuring Ditch, etc.]

§ 607. By this section it is provided that every person who willfully and maliciously cuts, breaks, injures or destroys any dam, canal, reservoir, etc., or who, between certain periods, plows up or loosens the soil in the bed or on the sides of any natural watercourse or channel, without removing such soil within a time stated, is guilty of a misdemeanor.

State Engineer.

By an "act to provide a system of irrigation," etc., approved March 29, 1878, the office of the state engineer was created, the duty of the engineer as to irrigation, etc., being prescribed by the act. 4 Deering's Codes and Statutes, p. 469.

COLORADO.

CONSTITUTIONAL PROVISIONS.

[Water Public Property.]

Art. 16, § 5. The water of every natural stream not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

[Right of Appropriation—Priority.]

Art. 16, § 6. The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.

[Right of Way—Eminent Domain.]

Art. 16, § 7. All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and flumes, for the purpose of conveying water for domestic purposes, for the

irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

Art. 2, § 14. Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches, on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.

Art. 2, § 15. Private property shall not be taken or damaged for public or private use without just compensation. Such compensation shall be ascertained by a board of commissioners of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

[County Commissioners to Fix Water Rates.]

Art. 16, § 8. The general assembly shall provide by law that the board of county commissioners, in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations.

[Taxation of Ditches.]

Art. 10, § 3. Ditches, canals and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose.

STATUTORY PROVISIONS.

[References to Mills' Annotated Statutes.]

This compilation contains the Colorado statutes on the subject of irrigation, excepting those relating to the adjudication of priorities and public control of irrigation, already discussed in the text, and some acts of local or temporary interest.

THE RIGHT OF APPROPRIATION.

[Owners of Lands on Streams Entitled to Use of Water.]

§ 2256. All persons who claim, own or hold a possessory right or title to any land or parcel of land lying within the boundary of the state of Colorado, as defined in the constitution of said state, when those claims are on the bank, margin or neighborhood of any stream of water, creek or river, shall be entitled to the use of the water of said stream, creek or river, for the purpose of irrigation, and making said claims available to the full extent of the soil, for agricultural purposes.

[Vested Rights Protected.]

§ 2275. Nothing in this chapter contained shall be so construed as to impair the prior vested rights of any mill

or ditch owner or other person to use the water of any such watercourse.

[Irrigation of Meadows.]

§ 2268. All persons who shall have enjoyed the use of the water in any natural stream for the irrigation of any meadow land, by the natural overflow or operation of the water of such stream, shall, in case the diminishing of water supplied by such stream for any cause prevents such irrigation therefrom in as ample a manner as formerly, have the right to construct a ditch for the irrigation of such meadow, and to take water from such stream therefor, and his, her or their right to water through such ditch shall have the same priority as though such ditch had been constructed at the time he, she or they first occupied and used such land as meadow ground.

[Appropriation of Waste and Seepage Water.]

§ 2269. That all ditches now constructed or hereafter to be constructed for the purpose of utilizing the waste, seepage or spring waters of the state shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the waters of running streams: provided, that the person upon whose lands the seepage or spring water first arise shall have the prior right to such waters if capable of being used upon his lands.

[Exchange of Water Between Streams.]

§ 1. Whenever any person or company shall divert water from one public stream and turn it into another public stream, such person or company may take out the same

amount of water again, less a reasonable deduction for seepage and evaporation, to be determined by the state engineer.

§ 2. Any person or company transferring water from one public stream to another shall be required to construct and maintain, under the direction of the state engineer, measuring flumes or weirs and self-registering devices at the point where the water leaves its natural watershed and is turned into another, and also where it is finally diverted for use from the public stream.

§ 3. It shall be the duty of the water commissioner of the district in which the water is used to keep a record of the amount of water so turned into his district from any other district.

§ 4. When the rights of others are not injured thereby, it shall be lawful for the owner of a reservoir to deliver stored water into a ditch entitled to water, or into the public stream, to supply appropriations from said stream, and to take in exchange therefor from the public stream higher up an equal amount of water, less a reasonable deduction for loss, if any there be, to be determined by the state engineer: provided, that the person or company desiring such exchange shall be required to construct and maintain, under the direction of the state engineer, measuring flumes or weirs and self-registering devices at the point where the water is turned into the stream or ditch taking the same, or as near such point as is practicable, so that the water commissioner may readily determine and secure the just and equitable change of water as herein provided. [Laws 1897, p. 176.]

[Exchange of Water Between Ditches.]

§ 3. It shall be lawful, however, for the owners of ditches and water rights taking water from the same stream, to exchange with, and loan to each other, for a limited time, the water to which each may be entitled, for the purpose of saving crops or of using the water in a more economical manner: provided, that the owner or owners making such loan or exchange shall give notice in writing, signed by all the owners participating in said loan or exchange, stating that such loan or exchange has been made, and for what length of time the same shall continue, whereupon said water commissioner shall recognize the same in his distribution of water. [Laws 1899, p. 235.]

[Domestic Uses Preferred.]

3 Mills' Ann. St. § 2269a. Water claimed and appropriated for domestic purposes shall not be employed or used for irrigation or for application to land or plants in any manner to any extent whatever: provided, that the provisions of this section shall not prohibit any citizen or town or corporation organized solely for the purpose of supplying water to the inhabitants of such city or town from supplying water thereto for sprinkling streets and extinguishing fires or for household purposes.

3 Mills' Ann. St. § 2269b. This section provides that any person claiming the right to divert water for domestic purposes from any natural stream who shall apply or knowingly permit the water so diverted to be applied to other than domestic purposes, to the injury of any other person entitled to use such water for irrigation, shall be deemed guilty of a misdemeanor, and subject to a prescribed penalty.

RIGHT OF WAY FOR DITCHES, ETC.

[Right of Way Granted.]

§ 2257. When any person owning claims in such locality has not sufficient length of area exposed to said stream to obtain a sufficient fall of water to irrigate his land, or that his farm or land used by him for agricultural purposes is too far removed from said stream, and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or tracts of lands which lie between him and said stream, or the farms or tracts of lands which lie above or below him on said stream, for the purposes hereinbefore stated.

[Right Limited.]

§ 2258. Such right of way shall extend only to a ditch, dyke or cutting sufficient for the purpose required.

[Condemnation of Right of Way.]

§ 2260. Upon the refusal of the owners of tracts of land or lands through which said ditch is proposed to run to allow of its passage through their property, the person or persons desiring to open such ditch may proceed to condemn and take the right of way therefor (under the provisions of chapter thirty-one [Mills' Ann. St. c. 45] of these laws, concerning eminent domain).

[Only One Ditch When Practicable.]

§ 2261. No tract or parcel of improved or occupied land in this state shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches constructed for the purpose of conveying

water through said property to lands adjoining or beyond the same, when the same object can feasibly and practicably be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch.

[Shortest Route to be Taken.]

§ 2262. Whenever any person or persons find it necessary to convey water for the purpose of irrigation through the improved or occupied lands of another, he or they shall select for the line of such ditch through such property the shortest and most direct route practicable upon which said ditch can be constructed with uniform or nearly uniform grade, and discharge the water at a point where it can be conveyed to and used upon the land or lands of the person or persons constructing such ditch.

[Ditch Owner must Permit Enlargement of Ditch.]

§ 2263. No person or persons having constructed a private ditch for the purposes and in the manner hereinbefore provided shall prohibit or prevent any other person or persons from enlarging or using any ditch by him or them constructed in common with him or them, upon payment to him or them of a reasonable proportion of the cost of construction of said ditch.

[Right to Extend Heads of Ditches up Stream.]

§ 2264. In case the channel of any natural stream shall become so cut out, lowered, turned aside or otherwise changed from any cause as to prevent any ditch, canal or feeder of any reservoir from receiving the proper inflow of water to which it may be entitled from such natural stream,

the owner or owners of such ditch, canal or feeder shall have the right to extend the head of such ditch, canal or feeder to such distance up the stream which supplies the same as may be necessary for securing a sufficient flow of water into the same, and for that purpose shall have the same right to maintain proceedings for condemnation of right of way for such extension as in case of constructing a new ditch, and the priority of right to take water from such stream through such ditch, canal or feeder as to any such ditch, canal or feeder shall remain unaffected in any respect by reason of such extension: provided, however, that no such extension shall interfere with the complete use or enjoyment of any other ditch, canal or feeder.

[Map and Statement to be Filed.]

§§ 2265, 2266. This act has been held unconstitutional on account of the insufficiency of its title [see text, § 40]. For a statute copied substantially from this act, see Bal. Codes Wash. §§ 4141, 4142, infra.

[Change of Point of Diversion.]

By the act of April 6, 1899, it was provided that persons desirous of changing the point of diversion of water shall present a petition to the district court from which the original decree defining his water right issued, which petition shall be heard in the same manner as a petition for an original decree. Should the decree be granted, the petitioner is required to prepare maps of the ditches, etc., and file the same, with a copy of the decree, with the county clerk and state engineer, and the state engineer shall notify the proper water commissioner, who shall thereupon allot to the new ditch the priority formerly alloted to the original ditch. [Laws 1899, p. 235, §§ 1, 2.]

[Right to Place Wheels, etc., on Banks of Streams.]

§ 2273. All persons on the margin, brink, neighborhood or precinct of any stream of water shall have the right and power to place upon the bank of said stream a wheel or other machine for the purpose of raising water to the level required for the purpose of irrigation, and the right of way shall not be refused by the owner of any tract of land upon which it is required, subject, of course, to the like regulations as required for ditches, and laid down in sections hereinbefore enumerated.

Duties and Liabilities of Ditch Owners.

[Owner must Maintain Embankments—Tail Ditch.]

§ 2274. The owner or owners of any ditch for irrigation or other purposes shall carefully maintain the embankments thereof, so that the waters of such ditch may not flood or damage the premises of others, and shall make a tail ditch, so as to return the water in such ditch, with as little waste as possible, into the stream from which it was taken.

[Bridging Ditches Crossing Public Highways.]

§ 2276. Any ditch company constructing a ditch, or any individual having ditches, for irrigation, or for other purposes, wherever the same be taken across any public highway or public traveled road, shall put a good substantial bridge, not less than fourteen feet in breadth, over such watercourse where it crosses said road.

§ 2277. When any such ditch or watercourse shall be constructed across any public traveled road, and not bridged within three days thereafter, it shall be the duty of the

supervisor of the road district to put a bridge over said ditch or watercourse, of the dimensions specified in section ten [section 2276] of this chapter, and call on the owner or owners of the ditch to pay the expenses of constructing such bridge.

§ 2281. This section prescribes the proceedings against the ditch owner to compel payment.

[Duty to Construct Headgates.]

§ 2285. The owner or owners of every irrigating ditch, flume or canal in this state shall be required to erect and keep in good repair a headgate at the head of their ditch, flume or canal. Such headgate, together with the necessary embankments, shall be of sufficient height and strength to control the water at all ordinary stages. The framework of such headgate shall be constructed of timber not less than four inches square, and the bottom, sides and gate or gates shall be of plank not less than two inches in thickness.

§ 2286. Owners of all ditches shall be liable for all damages resulting from their neglect or refusal to comply with the provisions of the preceding section.

§§ 2293, 2294. By a later act it is made the duty of all persons diverting water to erect and maintain headgates and wastegates, and to provide suitable locks and fastenings for the headgates, and, upon their failure to do so after five days' notice from the water commissioner or state engineer, the water commissioner shall do so at the ditch owner's expense. The keys to such locks are to be kept by the water commissioner during the irrigating season.

[Ditches in Cities to be Covered.]

§ 2278. This section requires the owners of ditches two

feet wide or over, and carrying water to a depth of twelve inches or over, in cities, to keep such ditches covered.

[Headgate to be Latticed.]

§ 2279. This section requires the headgates of such ditches to be latticed.

[Penalty.]

§ 2780. This section provides a penalty for a violation of the two preceding sections.

[Liability of Co-Owners of Ditches for Cleaning and Repairs.]

3 Mills' Ann. St. §§ 2872a-2872j. Co-owners of unincorporated irrigating ditches are required to contribute to the expense and labor of cleaning and repairing the ditch, and upon the failure of one or more, upon the request of the others, to contribute, the others may do the work, and shall have a lien upon the interest of the delinquent or delinquents for his or their proportionate share of the cost. The mode of securing and enforcing the lien is prescribed, and the lien is made assignable.

[Ditch Owner must Prevent Waste.]

§ 2282. The owner of any irrigating or mill ditch shall carefully maintain and keep the embankments thereof in good repair, and prevent the water from wasting.

[Running Excess of Water Forbidden.]

§ 2283. During the summer season it shall not be lawful for any person or persons to run through his or their irrigating ditch any greater quantity of water than is ab-

solutely necessary for irrigating his or their said land, and for domestic and stock purposes; it being the intent and meaning of this section to prevent the wasting and useless discharge and running away of water.

[Penalty—Violation of Above Provisions.]

§ 2284. Any person who shall willfully violate any of the provisions of this act shall, on conviction thereof before any court having competent jurisdiction, be fined in a sum of not less than one hundred (100) dollars. Suits for penalties under this act shall be brought in the name of the people of the state of Colorado.

[When Water Shall be Kept Flowing in Ditches.]

3 Mills' Ann. St. § 2287. Every person or company owning or controlling any canal or ditch used for the purposes of irrigation and carrying water for pay shall, when demanded by the users during the time from April 1st until November 1st in each year keep a flow of water therein, so far as may be reasonably practical for the purpose of irrigation, sufficient to meet the requirements of all such persons as are properly entitled to the use of water therefrom, to the extent, if necessary, to which such person may be entitled to water, and no more: provided, however, that whenever the rivers or public streams or sources from which the water is obtained are not sufficiently free from ice, or the volume of water therein is too low and inadequate for that purpose, then such canal or ditch shall be kept with as full a flow of water therein as may be practicable, subject, however, to the rights of priorities from the streams or other sources, as provided by law, and the necessity of cleaning, repairing and maintaining the same in good condition.

[Ditches to be Kept in Repair—Outlets.]

§ 2288. The owners or persons in control of any canal or ditch used for irrigating purposes shall maintain the same in good order and repair, ready to receive water by April 15th in each year, so far as can be accomplished by the exercise of reasonable care and diligence, and shall construct the necessary outlets in the banks of the canal or ditch for a proper delivery of the water to persons having paid-up shares, or who have rights to the use of the water: provided, however, that a multiplicity of outlets in the canal or ditch shall at all times be avoided, so far as the same shall be reasonably practicable, and the location of the same shall be under the control of, and shall be at the most convenient and practicable points consistent with the protection and safety of the ditch for the distribution of water among the various claimants thereof; and such location shall be under the control of a superintendent.

[Duty of Ditch Owners to Appoint Superintendent.]

§ 2289. It shall be the duty of those owning or controlling such canals or ditches to appoint a superintendent, whose duty it shall be to measure the water from such canal or ditch through the outlets, to those entitled thereto, according to his or her pro rata share.

[Liability of Superintendent for Failure to Deliver Water.]

§ 2290. Any superintendent or any person having charge of the said ditch who shall willfully neglect or refuse to deliver water, as in this act provided, or any person or persons who shall prevent or interfere with the proper delivery of water to the person or persons having the right thereto, shall be guilty of a misdemeanor, and upon

conviction thereof shall be subject to a fine of not less than ten nor more than one hundred dollars for each offense, or imprisonment not exceeding one month, or by both such fine and imprisonment; and the money thus collected shall be paid into the general fund of the county in which the misdemeanor has been committed; and the owner or owners of such ditches shall be liable in damages to the person or persons deprived of the use of the water to which they were entitled as in this act provided.

[Water to be Prorated in Case of Deficiency.]

§ 2267. If at any time any ditch or reservoir from which water is or shall be drawn for irrigation shall not be entitled to a full supply of water from the natural stream which supplies the same, the water actually received into and carried by such ditch, or held in such reservoir, shall be divided among all the consumers of water from such ditch or reservoir, as well as the owners, shareholders or stockholders thereof, as the parties purchasing water therefrom; and parties taking water partly under and by virtue of holding shares, and partly by purchasing the same, to each his share pro rata, according to the amount he, she or they (in cases in which several consume water jointly) shall be then entitled, so that all owners and purchasers shall suffer from the deficiency arising from the cause aforesaid each in proportion to the amount of water to [sic] which he, she or they should have received in case no such deficiency of water had occurred.

[No Person to Receive More Water Than he is Entitled to.]

§ 2395. That it shall be the duty of every person who is entitled to take water for irrigation purposes from any

ditch, canal or reservoir to see that he receives no more water from such ditch, canal or reservoir through his headgate, or by any ways or means whatsoever, than he is entitled to, and that he shall at all times take every precaution to prevent more water than he is entitled to coming from such ditch, canal or reservoir upon his land.

[Duty of Person Receiving Excess of Water.]

§ 2396. That it shall be the duty of every such person, taking water from any ditch, canal or reservoir, to be used for irrigation purposes, on finding that he is receiving more water from such ditch, canal or reservoir, either through his headgate, or by means of leaks, or by any means whatsoever, immediately to take steps to prevent his further receiving more water from such ditch, canal or reservoir than he is entitled to, and if knowingly he permits such extra water to come upon his land from such ditch, canal or reservoir, and does not immediately notify the owner or owners of such ditch to take steps to prevent its further flowing upon his land, he shall be liable to any person, company or corporation who may be injured by such extra appropriation of water for the actual damage sustained by the party aggrieved; which damages shall be adjudged to be paid, together with the costs of suit, and a reasonable attorney's fee, to be fixed by the court and taxed with the costs.

Regulation of Distribution of Water.

[Allotment of Water on Alternate Days.]

§ 2259. In case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, then the county judge of the county shall appoint three commis-

sioners as hereinafter provided, whose duty it shall be to apportion in a just and equitable proportion a certain amount of said water upon certain or alternate weekly days to different localities, as they may in their judgment think best for the interests of all parties concerned, and with due regard to the legal rights of all.

This section seems to have been superseded by later statutes as to the appointment and duties of water commissioners.

Reservoirs and Storage of Water.

[Right of Storage.]

§ 2270. Persons desirous to construct and maintain reservoirs for the purpose of storing water shall have the right to take from any of the natural streams of the state and store away any unappropriated water not needed for immediate use for domestic or irrigating purposes, to construct and maintain ditches for carrying such water to and from such reservoir, and to condemn lands for such reservoirs and ditches in the same manner provided by law for the condemnation of land for right of way for ditches: provided, no reservoir with embankments or a dam exceeding ten feet in height shall be made without first submitting the plans thereof to the county commissioners of the county in which it is situated, and obtaining their approval of such plans.

[Use of Natural Stream for Conducting Water.]

§ 2271. The owners of any reservoir may conduct the water therefrom into and along any of the natural streams of the state, but not so as to raise the waters thereof above ordinary high-water mark, and may take the same out again at any point desired, without regard to the prior rights of

others to water from said stream; but due allowance shall be made for evaporation and scapage [seepage], the amount to be determined by the commissioners of irrigation of the district, or, if there are no such commissioners, then by the county commissioners of the county in which the water shall be taken out for use.

[Liability of Reservoir Owner.]

§ 2272. The owners of the reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom, or by floods caused by breaking of the embankments of such reservoirs.

DITCH AND RESERVOIR COMPANIES.

[Organization of Ditch and Reservoir Companies.]

3 Mills' Ann. St. § 567. When any three or more persons associate under the provisions of this chapter [chapter 30, "Corporations"] to form a corporation for the purpose of constructing a ditch, reservoir, pipe line, or any thereof, for the purpose of conveying water from any natural or artificial stream, channel or source whatever, to any mines, mills or lands, or storing the same, they shall, in their certificate, in addition to the matters required in section 2 of this chapter [i. e., the matters required of all corporations], specify as follows, viz.: The stream, channel or source from which the water is to be taken; the point or place at or near which the water is to be taken out; the location, as near as may be, of any reservoir intended to be constructed; the line, as near as may be, of any ditch or pipe line intended to be constructed; and the use to which the water is intended to be applied.

[Extension of Term of Incorporation.]

3 Mills' Ann. St. § 567a. When the term of years for which any corporation which has been, or may hereafter be, incorporated as a ditch company for the purpose of carrying water for irrigation purposes, or as a reservoir company for the storage of water for irrigation purposes, has expired, or is about to expire by lawful limitation, and such corporation has not been administered upon as an expired corporation, or gone into liquidation and settlement and division of its affairs, it may have its term of incorporation extended and continued, the same as if originally incorporated, as hereinafter provided.

3 Mills' Ann. St. § 567a. This section prescribes the mode of extending the life of the corporation by vote of the stockholders.

[Consolidation of Ditch Companies.]

§ 572. Companies organized under the laws of this state holding ditches or canals by virtue of their organization, which derive their supply of water for their respective ditches or canals from the same headgate or gates, or the same source or sources of supply, may consolidate their interests and unite their respective companies under one name and management, by filing a certificate of that fact in the office of the secretary of this state, and a counterpart thereof in the office of the recorder of the county or counties in which such ditches or canals are situated; which certificate shall be signed by the presidents of the companies so uniting, with the common seals of the companies affixed thereto, and shall set forth the fact of such union of interests, and give the name of the new company thus formed.

[**Levy of Assessments.**]

§ 569. Any corporation owning any ditch or canal for conveying, or reservoir for storing, water for irrigation purposes, and the capital stock being fully subscribed and paid up, and when such corporation shall have no income sufficient to keep its ditch, canal or reservoir in good repair, such corporation shall have power to make an assessment on the capital stock thereof, to be levied pro rata on all the shares of stock, payable in money or labor, or both, for the purpose of keeping the property of such corporation in good repair, and for the payment of any claim against such corporation not otherwise provided for. But no such assessment shall be made unless the question of making such assessment shall first be submitted to the stockholders of such corporation at an annual meeting, or at a special meeting called for that purpose, and a majority of the stockholders, either in person or by proxy, voting thereon, shall vote in favor of making such assessments, and an action may be maintained to recover any assessment against any delinquent shareholder, as provided in section five (5) [Mills' Ann. St. § 480] of this act.

[**Right of Way for Ditch Companies.**]

3 Mills' Ann. St. § 568. Any ditch, reservoir or pipeline company formed under the provisions of this chapter [on corporations] shall have the right of way over the line named in the certificate, and shall also have the right to run water from the stream, channel or watercourse, whether natural or artificial, named in the certificate, through its ditch or pipe line, and store the same in any reservoir of the company when not needed for immediate use: provided, that the line proposed shall not interfere with any

other ditch, pipe line or reservoir having prior rights, except the right to cross by pipe or flume; nor shall the water of any stream, channel or other watercourse, whether natural or artificial, be diverted from its original channel or source, to the detriment of any person or persons having priority of right thereto, but this shall not be construed to prevent the appropriation and use of any water not theretofore utilized and applied to beneficial uses.

[Construction of Works.]

§ 573. Any company formed under the provisions of this act for the purpose of constructing any ditch, flume * * * shall, within ninety days from the date of their certificate, commence work on such ditch, flume * * * as shall be named in the certificate, and shall prosecute the work with due diligence until the same is completed, and the time of completion of any such ditch * * * shall not be extended beyond a period of two years from the time work was commenced as aforesaid; and any company failing to commence work within ninety days from the date of the certificate, or failing to complete the same within two years from the time of commencement as aforesaid, shall forfeit all right to the water so claimed, and the same shall be subject to be claimed by any other company; the time for the completion of any flume constructed under the provisions of this act shall not be extended beyond a period of four years: provided, this section shall not apply to any ditch or flume * * * constructed through and upon any grounds owned by the corporation: and provided, further, that any company formed under the provisions of this act to construct a ditch for domestic, agricultural, irrigating * * * purposes, or any or either thereof, shall have three years from

the time of commencing work thereon within which to complete the same, but no longer.

[Ditch Company must Keep Ditch in Good Condition.]

§ 571. Every ditch company organized under the provisions of this act shall be required to keep their ditch in good condition, so that the water shall not be allowed to escape from the same to the injury of any mining claim, road, ditch or other property; and whenever it is necessary to convey any ditch over, across, or above any lode or mining claim, or to keep the water so conveyed therefrom, the company shall, if necessary to keep the water of said ditch out or from any claim, flume the ditch so far as necessary to protect such claim or property from the water of said ditch.

[Duty to Furnish Water to Consumers.]

§ 570. Any company constructing a ditch under the provisions of this act shall furnish water to the class of persons using the water in the way named in the certificate, in the way the water is designated to be used, whether miners, mill men, farmers or for domestic use, whenever they shall have water in their ditch unsold, and shall at all times give the preference to use of the water in said ditch to the class named in the certificate; the rates at which water shall be furnished to be fixed by the county commissioners as soon as such ditch shall be completed and prepared to furnish water.

[Right of Consumer to Continue Purchasing Water.]

§ 2297. Any person or persons, acting jointly or severally, who shall have purchased and used water for irrigation for lands occupied by him, her or them, from any ditch or reservoir, and shall not have ceased to do so, for the pur-

pose or with intent to procure water from some other source of supply, shall have a right to continue to purchase water to the same amount for his, her or their lands, on paying or tendering the price thereof fixed by the county commissioners as above provided, or, if no price shall have been fixed by them, the price at which the owners of such ditch or reservoir may be then selling water, or did sell water during the then last preceding year. This section shall not apply to the case of those who may have taken water as stockholders or shareholders after they shall have sold or forfeited their shares or stock, unless they shall have retained a right to procure such water by contract, agreement or understanding and use between themselves and the owners of such ditch, and not then to the injury of other purchasers of water from or shareholders in [the] same ditch.

Regulation of Water Rates.

Pursuant to the constitutional provision [article 16, § 8], an act was passed in 1879 providing for the regulation of water rates by the county commissioners [Mills' Ann. St. §§ 2295, 2296]. These provisions appear to have been superseded, in the main at least, by the act of 1887, which provides as follows:

[County Commissioners to Hear and Consider Applications.]

§ 2298. The county commissioners of each county shall at their regular sessions in each year, and at such other sessions as they in their discretion may deem proper, in view of the irrigation and harvesting season, and the convenience of all parties interested, hear and consider all applications which may be made to them by any party or parties interested, either in furnishing and delivering for compensation

in any manner, or in procuring for such compensation, water for irrigation, mining, milling, manufacturing or domestic purposes, from any ditch, canal, conduit or reservoir, the whole or any part of which shall lie in such county. Which application shall be supported by such affidavits as the applicant or applicants may present, showing reasonable cause for such board of county commissioners to proceed to fix a reasonable maximum rate of compensation for water to be thereafter delivered from such ditch, canal, conduit or reservoir within such county.

[Appointment of Day for Hearing.]

§ 2299. Every such board of commissioners shall, upon examination of such affidavit or affidavits, or from the oaths of witnesses in addition thereto, if they find that the facts sworn to show the application to be in good faith, and that there are reasonable grounds to believe that unjust rates of compensation are, or are likely to be, charged or demanded for water from such ditch, canal, conduit or reservoir, shall enter an order fixing a day not sooner than twenty days thereafter, nor later than the third day of the next regular session of their board, when they shall hear all parties interested in such ditch, or other waterworks as aforesaid, or in procuring water therefrom, for any of the said uses, as well as all documentary or oral evidence or depositions, taken according to law, touching the said ditch, or other work as aforesaid, and the cost of furnishing water therefrom.

[Commissioners to Fix Rates.]

§ 2300. At the time so fixed, all persons interested as aforesaid, on either side of the controversy, in lands which

may be irrigated from such ditch, or other work aforesaid, may appear by themselves, their agents or attorneys, and said commissioners shall then proceed to take action in the matter of fixing such rates of compensation for the delivery of water. [This section further provides that the applicant or applicants shall give notice of the hearing to interested parties, and provides also for the taking of depositions to be used before the commissioners.]

[Postponement of Hearing—Witnesses—Order of Board.]

§ 2301. Said board of commissioners may adjourn or postpone any hearing from time to time, as may be found necessary for the convenience of parties, or of public business; and they shall hear and examine all legal testimony or proofs offered by any party interested as aforesaid, as well concerning the original cost and present value of works and structures of such ditch, canal, conduit or reservoir, as the cost and expense of maintaining and operating the same, and all matters which may affect the establishing of a reasonable maximum rate of compensation for water to be furnished and delivered therefrom; and they may issue subpoenas for witnesses, which subpoenas shall be served by the sheriff of the county, who shall receive the lawful fees for all such service; and said board may also issue a subpoena for the production of all books and papers required for evidence before them. Upon hearing and considering all the evidence and facts, and matters involved in the case, said board of commissioners shall enter an order describing the ditch, canal, conduit, reservoir or other work in question with sufficient certainty, and fixing a just and reasonable maximum rate of compensation for water to be thereafter delivered from such ditch or other work as last afore-

said, within the county in which such commissioners act, and such rate shall not be changed within two years from the time when they shall be so fixed, unless upon good cause shown. The district court of the proper county, or the judge thereof in vacation, may, in case of refusal to obey the subpoena of the board of county commissioners, compel obedience thereto, or punish for refusal to obey, after hearing, as in cases of attachment, for contempt of such district court.

[False Swearing.]

§ 2302. False swearing in the above proceedings is declared by this section to be perjury, and punishable accordingly.

Anti-Royalty Act.

[Royalties Prohibited.]

§ 2304. It shall not be lawful for any person owning or controlling, or claiming to own or control, any ditch, canal or reservoir, carrying or storing, or designed for the carrying or storing, of any water taken from any natural stream or lake within this state, to be furnished or delivered for compensation, for irrigation, mining, milling or domestic purposes, to persons not interested in such ownership or control, to demand, bargain for, accept or receive, from any person who may apply for water for any of the aforesaid purposes, any money or other valuable thing whatsoever, or any promise or agreement therefor, directly or indirectly, as royalty, bonus or premium prerequisite or condition precedent to the right or privilege of applying or bargaining for or procuring such water. But such water shall be furnished, carried and delivered upon the payment or tender of

the charges fixed by the county commissioners of the proper county, as is or may be provided by law. Any and all moneys, and every valuable thing or consideration of whatsoever kind which shall be so, as aforesaid, demanded, charged, bargained for, accepted, received or retained, contrary to the provisions of this section, shall be deemed and held an additional and corrupt rate, charge or consideration for the water intended to be furnished and delivered therefor, or because thereof, and wholly extortionate and illegal; and when paid, delivered or surrendered may be recovered back by the party or parties paying, delivering or surrendering the same from the party to whom or for whose use the same shall have been paid, delivered or surrendered, together with costs of suit, including reasonable fees of attorneys of plaintiff, by proper action in any court having jurisdiction.

[Penalty for Collecting Excessive Rate.]

§ 2305. Every person owning or controlling, or claiming to own or control, any ditch, canal or reservoir, such as is mentioned in the first section of this act [section 2304], who shall, after demand in writing made upon him for the supply or delivery of water for irrigation, mining, milling or domestic purposes, to be delivered from the canal, ditch or reservoir owned, possessed or controlled by him, and after tender of the lawful rate of compensation therefor, in lawful money, (*) demand, require, bargain for, accept, receive or retain from the party making such application, any money or other thing of value, or any promise or contract or any valuable consideration whatever, as such royalty, bonus, premium, prerequisite or condition precedent, as is by the provisions of the said first section of this act prohibited, shall be deemed guilty of a misdemeanor, and,

on conviction thereof, shall be punished by fine of not less than one hundred dollars, nor more than five thousand dollars, or imprisonment for a term not less than three months, nor more than one year, or both such fine and imprisonment, in the discretion of the court.

[Refusal to Deliver Water—Penalty.]

§ 2306. [This section is the same as the preceding section down to (*), and continues as follows]: Refuse to furnish or carry and deliver from such ditch, canal or reservoir, any water so applied for, which water can or may be, by use of reasonable diligence in that behalf, and within the carrying or storage capacity of such ditch, canal or reservoir, be lawfully furnished and delivered, without infringement of prior rights, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by [same penalty as in preceding section].

[Prosecution by Attorney General for Refusal to Deliver Water.]

§ 2307. When any corporation, in defiance or by attempted evasion of the provisions of this act, shall, after tender of the compensation hereinbefore provided for, refuse to deliver water, such as is mentioned in the third section of this act, to any person lawfully entitled to apply therefor, it shall be the duty of the attorney general, upon request of the county commissioners of the proper county, or upon his otherwise receiving due notice thereof, to institute and prosecute to judgment and final determination proceedings in quo warranto for the forfeiture of the corporate rights, privileges and franchises of any such corporation so offending, or by mandamus or other proper proceedings to compel it to its duty in that behalf.

[Who Liable for Violation of Act.]

§ 2308. The word "person," as used in this act, shall include corporations and associations, and the plural as well as the singular number. And every officer of a corporation, or member of an association or co-ownership, and every agent violating any of the provisions of this act, shall be liable to restore the unlawful consideration extorted, and be punishable under the penal provisions of this act, the same as if the thing done in disobedience to its provisions were done for his own sole benefit and advantage.

MEASUREMENT OF WATER.

[State Engineer Required to Measure Flow of Streams.]

§ 2459. The state engineer is required to "make or cause to be made careful measurements of the flow of the public streams of the state from which water is diverted for any purpose, and compute the discharge of the same."

[Measurement of Canals, Dams, etc.]

§ 2462. The state engineer shall, on request of any party interested, and on payment of his per diem charges and reasonable expenses, appoint a deputy to measure, compute and ascertain all necessary data of any canal, dam, reservoir or other construction, as required or as may be desired to establish court decrees, or for filing statements, in compliance with law, in the county clerk's records.

[Owners of Ditches may be Required to Construct Weirs.]

§ 2466. For the more accurate and convenient measurement of any water appropriated pursuant to any judgment or decree rendered by any court establishing the claims of priority of any ditch, canal or reservoir, the owners thereof may be required by the state engineer to construct and

maintain, under the supervision of the state engineer, a measuring weir or other device for measuring the flow of the water at the head of such ditch, canal or reservoir, or as near thereto as practicable. The state engineer shall compute, and arrange in tabular form, the amount of water that will pass such weir or measuring device at the different stages thereof, and he shall furnish a copy of a statement thereof to any water superintendents or commissioners having control of such ditch, canal or reservoir.

[Unit of Measurements.]

§ 2467. The state engineer shall use, in all his calculations, measurements, records and reports, the cubic foot per second as the unit of measurement of flowing water, and the cubic foot as the unit of measurement of volume.

[Unit of Measurement of Water Sold.]

§ 4643. Water sold by the inch by any individual or corporation shall be measured as follows, towit: Every inch shall be considered equal to an inch-square orifice under a five-inch pressure, and a five-inch pressure shall be from the top of the orifice of the box put into the banks of the ditch to the surface of the water; said boxes, or any slot or aperture through which such water may be measured, shall in all cases be six inches perpendicular, inside measurement, except boxes delivering less than twelve inches, which may be square, with or without slides; all slides for the same shall move horizontally, and not otherwise; and said box put into the banks of ditch shall have a descending grade from the water in ditch of not less than one-eighth of an inch to the foot.

OFFENSES.

[Injuring Ditch, Stealing Water, etc.]

§ 2393. Any person or persons who shall knowingly and willfully cut, dig, break down or open any gate, bank, embankment or side of any ditch, canal, flume, feeder or reservoir in which such person or persons may be a joint owner, or the property of another, or in the lawful possession of another or others, and used for the purpose of irrigation, manufacturing, mining or domestic purposes, with intent maliciously to injure any person, association or corporation, or for his or her own gain, unlawfully, with intent of stealing, taking or causing to run or pour out of such ditch, canal, reservoir, feeder or flume, any water for his or her own profit, benefit or advantage, to the injury of any other person, persons, association or corporation, lawfully in the use of such water or of such ditch, canal, reservoir, feeder or flume, he, she or they so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than five dollars nor more than three hundred dollars, and may be imprisoned in the county jail not exceeding ninety days.

§ 2394. Justices of the peace are given jurisdiction of offenses under the preceding section.

[Interfering with Headgate.]

§ 2385. Every person who shall willfully open, close, change or interfere with any headgate or water box, without authority, shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than fifty dollars, nor more than three hundred dollars, and may be imprisoned not exceeding sixty days.

MISCELLANEOUS PROVISIONS.

[Conveyance of Water Rights.]

3 Mills' Ann. St. § 427a. In the conveyance of water rights hereafter made in this state in all cases except where the ownership of stock in ditch companies or other companies constitute the ownership of a water right, the same formalities shall be observed and complied with as in the conveyance of real estate.

[Taxation of Ditches, etc.]

§ 2397. All ditches used for the purpose of irrigation, and that only where the water is not sold for the purpose of deriving a revenue therefrom, be and the same are hereby declared free from all taxation, whether for state, county or municipal purposes. [See, also, section 3766, identical with Const. art. 10, § 3.]

[Cities and Towns as Owners of Water Rights and Ditches.]

By several acts, cities and towns have been empowered to purchase water rights and to construct or purchase ditch, etc., and to regulate and control the distribution of water for irrigation and other purposes. [Sections 4403, 4539, 4540; 3 Mills' Ann. St. §§ 4540a-4540c.]

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CONSTITUTIONAL PROVISIONS.

[Use of Water for Sale, etc., a Public Use.]

Art. 15, § 1. The use of all waters now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, also of all water originally appropriated for private use, but which, after such appropriation, has heretofore been, or may hereafter be, sold, rented or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law.

[Right to Collect Water Rates a Franchise.]

§ 2. The right to collect rates or compensation for the use of water supplied to any county, city or town, or water district, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.

[Right to Appropriate Water—Priority.]

§ 3. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using

the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district, those using the water for mining purposes, or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use as referred to in section fourteen of article one of this constitution. [See post.]

[Right to Continue Use of Water.]

§ 4. Whenever any waters have been or shall be appropriated or used for agricultural purposes under a sale, rental or distribution thereof, such sale, rental or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with a view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors or assigns shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use as may be prescribed by law.

[Regulation of Priorities.]

§ 5. Whenever more than one person has settled upon or improved land with a view of receiving water for agricultural purposes, under a sale, rental or distribution thereof, as in the last preceding section of this article provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessity of those subsequent in time of settlement or improvement, may by law prescribe.

[Legislature to Provide Mode of Fixing Rates.]

§ 6. The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose.

[Eminent Domain.]

Art. 1, § 14. The necessary use of lands for the construction of reservoirs or storage basins, for the purposes of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes to convey water to the place of use, for any useful, beneficial or necessary purpose, * * * or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor.

STATUTORY PROVISIONS.

The Revised Statutes of 1887 contain a system of irrigation law set forth in three chapters, the first, relating to water rights generally, being practically a copy of the provisions of the California Civil Code [sections 3155-3167]. The other chapters relate to the acquisition of a right of way for ditches, etc., the rights and duties of the appropriators, and the distribution of water by water masters [sections 3180-3190, 3200-3205]. Most of these provisions seem to have been repealed or superseded by later acts, especially those found in the Session Laws of 1895 and 1899. In view of the fact that the legislation on the subject of irrigation seems to be in a somewhat unsettled condition, it is not deemed advisable to set out the various acts. The act of February 25, 1899 [Laws 1899, p. 380], entitled "An act providing for the appropriation and distribution of water; the condemnation of lands for canals, ditches and conduits; empowering the boards of county commissioners to establish a maximum rate for the use of water; and repealing all acts and parts of acts in conflict with the provisions of this act," seems intended to provide a complete system of irrigation law, based on the doctrine of appropriation. Its general provisions as to the right of appropriation, procedure of appropriation, by posting a notice, etc., the establishment of rates, the rights and duties of appropriators and of irrigation companies, etc., are very similar to those of other states, particularly California and Colorado. Statutes provide also for the organization of irrigation districts.

KANSAS.

The constitution of this state contains no provision on the subject of irrigation. By the act of 1885 and subsequent acts, particularly those of 1886 and 1891, a system of irrigation law more or less complete has been adopted. In respect to the right of appropriation, the doctrine of priority, the rights and duties of appropriators and ditch owners, offenses and the distribution of water by public carriers, the statutes are very similar to those of Colorado. There are no provisions, however, for the division of the state into water districts and divisions, or the appointment of public officers other than a water bailiff, to regulate and control the use of water for irrigation. It is deemed sufficient to present here only an outline of the statutes, special attention being given to those provisions peculiar to the state. The statutes comprise sections 3499 to 3642 of the General Statutes of 1899.

Appropriation of Water.

§§ 3501-3505. The general provisions as to the right to appropriate water, and the procedure of appropriation by posting a notice, etc., are practically the same as those of California.

[Appropriation and Diversion of Water West of Ninety-Ninth Meridian.]

§ 3519. In all that portion of the state of Kansas situated west of the ninety-ninth meridian, all natural waters, whether standing or running, and whether surface or sub-

terranean, shall be devoted, first, to purposes of irrigation in aid of agriculture, subject to ordinary domestic uses, and, second, to other industrial purposes, and may be diverted from natural beds, basins or channels for such purposes and uses: provided, that no such diversion shall interfere with, diminish or divest any prior vested right of appropriation for the same or a higher purpose than that for which such diversion is sought to be made, without the due legal condemnation of and compensation for the same; and natural lakes and ponds of surface water, having no outlet, shall be deemed parcel of the lands whereon the same may be situated, and only the proprietors of such lands shall be entitled to draw off or appropriate the same.

[Extent of Right Acquired by Appropriation.]

§ 3520. The appropriation of water hereafter shall in every case be deemed and be taken to be accomplished and effectual only as to so much water as shall have been actually applied to beneficial uses within a reasonable time after the commencement of the works by means of which such appropriation is intended to be made, or afterwards, where no appropriation has in the meantime been initiated by others, together with the reasonable amount necessary to supply losses by waste, seepage and evaporation. All the residue of the water within the capacity of the canal or other works shall be deemed to be derelict, and liable to appropriation by any subsequent appropriator.

[Subterranean Waters.]

§ 3523. Waters flowing in well-defined subterranean channels and courses, or flowing or standing in subterranean sheets or lakes, shall be subject to appropriation with the

same effect as the water of superficial channels; and no person shall be allowed, by drains, ditches, fountains, subterranean galleries or other works, to collect and divert percolating waters manifestly supplying such subterranean supplies, to the prejudice of any prior appropriator thereof. [The section concludes with provisos excepting certain cases of diversion of percolating waters from the prohibition of the statute.]

§ 3524. No person shall be permitted to take or appropriate the waters of any subterranean supply which naturally discharges into any superficial stream, to the prejudice of any prior appropriator of the water of such superficial channel.

Appropriation by Means of Artesian Wells.]

§ 3525. Every person complying with the provisions of this act, and applying the waters obtained by means of any artesian well to beneficial uses, shall be deemed to have appropriated such water to the extent to which the same shall be so applied within a reasonable time after the commencement of the work, and such appropriation shall have effect as of the day of commencement of such works, provided the same is prosecuted with reasonable diligence; otherwise, from the time of the application of the waters thereof to beneficial uses. [As to the duties of persons boring or owning artesian wells, see sections 3548-3552, 3608 3609.]

[Right Dependent upon User.]

§ 3526. Any prior right of appropriation shall exist and continue only by the exercise thereof in a lawful manner, and any failure of such appropriator continuously to apply such water to lawful and beneficial uses, without due and

sufficient cause shown for such failure, shall be deemed an abandonment and surrender of such right.

CONDEMNATION OF WATER RIGHTS.

[Water Rights Subject to Right of Eminent Domain.]

§§ 3527, 3533. Water rights are declared to be subject to the right of eminent domain, and may be condemned and compensated for, for public uses.

[Condemnation of Water Rights by Irrigation Companies.]

§ 3509. Any and all irrigating ditch and canal companies which have been heretofore organized or incorporated, or which may hereafter become organized and incorporated, for the purpose of procuring or furnishing water for the purposes of irrigation, which shall desire to condemn the right to take such water from any stream in the state of Kansas, shall have the right to procure such condemnation in the following manner. [Sections 3510-3518 relate to the condemnation proceedings.]

RIGHT OF WAY FOR DITCHES, ETC.

[Condemnation of Right of Way.]

§§ 3534-3537, 3572. Provision is made for the condemnation of rights of way and sites for irrigating ditches, reservoirs, etc., the shortest practicable route for a ditch to be taken, and no land to be burdened by more ditches than necessary.

[Condemnation of Reservoir Site.]

§ 3642. Any irrigation, canal or reservoir company, for the purpose of establishing any reservoir, lake or pond for

the storage of water, shall have the right to condemn lands in the same manner as is provided for the condemnation of lands for railroads and other purposes. [See, also, section 1325.]

[Abandonment of Right of Way.]

§ 3538. This section provides that a failure to use a right of way for two years shall constitute an abandonment thereof, and the title thereto shall revert to the original owner.

[Use of Works of Another.]

§ 3544. The proprietors of any ditch, conduit, reservoir or other works for the diversion, carriage, retention or storage of waters may procure the waters to which they are entitled, to be carried, stored and distributed from and through like works of any other proprietor, upon such terms as may be agreed upon between them, without in any manner impairing or affecting their right of priority in respect of such waters: provided, however, that thereby the waters supplied to any consumer be not diminished.

[Protection to Ditches Constructed with Consent of Owner of Land.]

§ 3506. Where any canal, ditch, flume or aqueduct which is the property of any individual, company or corporation, and is used for the purpose of irrigating land, has been located or constructed on or over any tract of land with the knowledge or consent of the owner of such lands, or upon or over any tract of land owned by the United States, and prior to the occupation of the same by any settler for the purpose of entry under any act of congress, such location and construction shall be prima facie evidence that the

same was rightful; and such canal, ditch, flume or aqueduct shall be deemed and held to come within the provisions and protection of section 1 of chapter 134 of the Session Laws of 1885 [providing a penalty for injuring canals (Gen. St. § 3500)]: provided, however, that such canal, ditch, flume or aqueduct shall have been constructed for a period of at least two years prior to the first day of January, A. D. eighteen hundred and eighty-six.

[Ditch Constructed on Unoccupied Land.]

§ 3507. Any individual, company or corporation who has heretofore constructed any canal, ditch, flume or aqueduct for the purposes of irrigation upon or over lands unoccupied at the time of such construction, who shall maintain the same for a period of five years succeeding such construction, without objection in writing from the owner of such land, or subsequent claimant under the laws of the United States or of the state of Kansas, shall, after the expiration of said period of five years, be deemed and held to have acquired a permanent right of way for such canal, ditch, flume or aqueduct, not exceeding, however, the total width of three times the width of such ditch, canal, flume or aqueduct. [As to the damages to be awarded, see section 3508.]

DUTIES OF DITCH OWNERS.

[As to Construction and Maintenance of Ditches, etc.]

The statutes contain detailed provisions as to the duties of ditch owners as to the construction and maintenance of their ditches, dams, etc., and the construction of headgates, measuring devices, waste gates, tail races, outlets, fences, bridges, etc. Sections 3539-3543, 3545, 3553-3559, 3568-3570, 3610-3618.

[Appointment of Superintendents.]

Provision is made for the appointment by ditch owners of superintendents, who are required to distribute the water to those entitled thereto. Sections 3546, 3547, 3602, 3603.

SALE OF WATER.

[Board of Railroad Commissioners to Fix Water Rates.]

§ 3573. The board of railroad commissioners are empowered, upon the complaint of purchasers of water from an irrigation company, to fix a rate of compensation for the use of water, such rate to be binding on the company for one year, and until the further order of the board therein.

§ 3574. The board of railroad commissioners shall have the same powers in relation to irrigation companies that they have in relation to railroad companies.

[Anti-Royalty Act.]

The statutes contain provisions substantially the same as the Colorado "Anti-Royalty Act." Sections 3599-3601.

[Right of Consumer to Continue to Receive Water.]

§ 3528. This section provides that consumers from the ditch of a carrier shall have the right to continue to receive water on payment of the price.

[Lien on Crop of Water Furnished.]

§ 3499. Any person, association or corporation which shall, under contract with the owner of a tract or piece of land, his agent or trustee, or under contract with the husband or wife of such owner, furnish water for irrigating any portion of said tract of land, shall have a lien upon the

whole crop grown upon said tract or parcel of land during the year the water is so furnished, for the full amount of the contract price.

STORAGE OF WATER.

§ 3531. Any person entitled to the use of water for the irrigation of lands or other purposes whatsoever may, at any time while so entitled to the use thereof, collect and store the same up for use presently thereafter; and the failure to apply or use such waters during the period of such collection and storage shall not be deemed or taken to impair his right in that behalf.

IRRIGATION DISTRICTS.

Provision is made for the organization of irrigation districts, the statute being somewhat similar to that of California. Sections 3575-3598.

IRRIGATION BOARD.

§§ 3624-3641. By an act approved March 5, 1895, a board of irrigation survey and experiment is created, and its duties as to conducting experiments in irrigation in the state are defined, and an appropriation made therefor.

MISCELLANEOUS PROVISIONS.

[Adjudication of Priorities—Water Bailiff.]

§ 3619. Exclusive jurisdiction for the ascertainment and settlement of the several rights and priorities of right of persons interested, either as carrier or consumer, in water at any time appropriated, is hereby conferred upon the several district courts having jurisdiction, within the limits pre-

scribed by this act; and the judge of any such district court may, whenever necessity therefor shall arise, appoint a water bailiff, commissioning him under the seal of the court of the county wherein said judge shall at the time be, ordering and empowering such water bailiff to prevent the waste of water from any artesian well, or the unlawful use thereof, or from the artesian wells of any district, by any person or persons, and to enforce priority of right of appropriation of such waters, or to demand and receive any key or keys to any headgate or headgates, waste gate or waste gates, or any other works in this act specified, and to safely keep the same so long as shall be necessary to carry out the orders of said court (returning the same thereafter to the owner or owners thereof, or disposing [of] the same according to the order of the court), and to divide the waters of any source of supply according to the rights and priorities of the parties entitled to receive the same, and conformably to the order of said court, and to open and close any such headgate or waste gate, or fill any such canal or ditch, as may be required to enforce the orders of such court, under the provisions of this act respecting the distribution of water to the parties lawfully entitled to receive the same. [The remainder of this section authorizes the employment of necessary assistance by the water bailiff, and provides for a compensation of $2 per day and expenses, to be paid by the county commissioners on the certificate of the district judge.]

[Rotation of Water.]

§§ 3560-3567. These sections provide for agreements between the owners of water rights for the rotation of water, by distributing it for particular days to particular consumers.

[Abandonment of Water Right.]

§ 3532. Any person transferring, selling, leasing, assigning or bargaining with reference to the transfer, sale, lease or assignment of any water, or any right he may have acquired to the use thereof, and any person receiving any money or other valuable thing whatsoever in consideration of the prorating or rotating of water, or in consideration of his agreement to prorate or rotate water, shall be deemed and taken to have abandoned all right to the use or enjoyment of such water: provided, however, such abandonment shall not operate to the prejudice of the rights of any incumbrancer or equitable owner of the lands, mill, manufactory or other works to which such water is appurtenant.

[Offenses.]

Penalties are prescribed for injuring ditches, etc. [section 3500], and for other unlawful acts in relation to ditches, headgates, etc. [sections 3605, 3606], and for the excessive use or waste of water [section 3604].

MONTANA.

CONSTITUTIONAL PROVISIONS.

[Use of Water a Public Use.]

Art. 3, § 15. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution or other beneficial use, and the right of way over the lands of others for all ditches, drains, flumes, canals and aqueducts necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use.

[Eminent Domain.]

Art. 3, § 14. Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner.

STATUTORY PROVISIONS.

[Reference to Civil Code 1895.]

THE RIGHT OF APPROPRIATION.

[Water may be Appropriated.]

§ 1880. The right to the use of running water flowing in the rivers, streams, canyons and ravines of this state may be acquired by appropriation.

[Appropriation must be for Useful Purpose.]

§ 1881. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.

[Place of Diversion and Use of Water may be Changed.]

§ 1882. The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe or aqueduct, by which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.

[Use of Natural Stream as Conduit.]

§ 1883. The water appropriated may be turned into the channel of another stream, and mingled with its waters, and then be reclaimed; but, in reclaiming it, water already appropriated by another must not be diminished in quantity, or deteriorated in quality.

[Surplus Water to be Returned to Stream.]

§ 1884. In all cases where, by virtue of prior appropriation, any person may have diverted all the water of any stream, or to such an extent that there shall not be an amount sufficient left therein for those having a subsequent right to the waters of such stream, and there shall at any time be a surplus of water so diverted, over and above what is actually

used by the appropriator, such person shall be required to turn and to cause to flow back into the stream such surplus water, and, upon failure so to do within five days after demand being made upon him in writing by any person having a right to the use of such surplus water, the person so diverting the same shall be liable to the person aggrieved thereby in the sum of twenty-five dollars for each and every day such water shall be withheld after such notice, to be recovered by civil action by any person having a right to the use of such surplus water.

[Priority of Appropriation.]

§ 1885. As between appropriators, the one first in time is first in right.

PROCEDURE OF APPROPRIATION.

[Notice of Appropriation to be Posted.]

§ 1886. Any person hereafter desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein (1) the number of inches claimed, measured as hereinafter provided; (2) the purpose for which it is claimed, and place of intended use; (3) the means of diversion, with size of flume, ditch, pipe or aqueduct by which he intends to divert it; (4) the date of appropriation; (5) the name of the appropriator.

Within twenty days after the date of appropriation, the appropriator shall file with the county clerk of the county in which such appropriation is made a notice of appropriation, which, in addition to the facts required to be stated in the posted notice, as hereinbefore prescribed, shall contain the name of the stream from which the diversion is made, if such stream have a name, and, if it have not, such a descrip-

tion of the stream as will identify it, and an accurate description of the point of diversion on such stream, with reference to some natural object or permanent monument. The notice shall be verified by the affidavit of the appropriator, or some one in his behalf, which affidavit must state that the matters and facts contained in the notice are true.

[Construction of Works—Right Limited by Capacity of Ditch.]

§ 1887. Within forty days after posting such notice, the appropriator must proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted, and must prosecute the same with reasonable diligence to completion. If the ditch or flume, when constructed, is inadequate to convey the amount of water claimed in the notice aforesaid, the excess claimed above the capacity of the ditch or flume shall be subject to appropriation by any other person, in accordance with the provisions of this title.

[Forfeiture of Right—Relation Back.]

§ 1888. A failure to comply with the provisions of this title deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith, but, by complying with the provisions of this title, the right to the use of the water shall relate back to the date of posting the notice.

[Declaration of Appropriation to be Filed.]

§ 1889. Persons who have heretofore acquired rights to the use of water shall, within six months after the publication of this title, file in the office of the county clerk of the county in which the water right is situated, a declaration in

writing, except notice be already given of record, as required by this title, or a declaration in writing be already filed, as required by this section, containing the same facts as required in the notice provided for record in section 1886 of this title, and verified as required in said last-mentioned section, in cases of notice of appropriation of water: provided, that a failure to comply with the requirements of this section shall in no wise work a forfeiture of such heretofore acquired rights, or prevent any such claimant from establishing such rights in the courts.

[Record as Evidence.]

§ 1890. The record provided for in sections 1886 and 1889 of this title, when duly made, shall be taken and received in all courts of this state as prima facie evidence of the statements therein contained.

[County Clerk Must Keep Record Book.]

§ 1892. The county clerk must keep a well-bound book, in which he must record the notices and declarations provided for in this title, and he shall be entitled to have and receive the same fees as are now or hereafter may be allowed by law for recording instruments entitled to be recorded.

Right of Way, Etc.

§ 1894. The right to conduct water from or over the land of another for any beneficial use includes the right to raise any water by means of dams, reservoirs or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefor may be acquired upon payment of just compensation in the manner provided by law for the taking of private

property for public use: provided, further [the proviso relates to the right to construct ditches, etc., across the right of way of a railroad].

Sale of Water.

[Duty to Sell Water.]

§ 1897. Any person having the right to use, sell or dispose of water, and engage in using, selling or disposing of the same, who has a surplus of water not used or sold, or any person having a surplus of water, and the right to sell and dispose of the same, is required, upon the payment or tender to the person entitled thereto an amount equal to the usual and customary rate per inch, to carry and deliver to the person such surplus of unsold water, or so much thereof for which said payment or tender shall have been made, and shall continue so to convey and deliver the same weekly so long as said surplus of unused or unsold water exists, and said payment or tender be made as aforesaid.

[Duty of Consumers.]

§ 1898. Any person desiring to avail himself of the provisions of the preceding section must, at his own cost and expense, construct or dig the necessary flumes or ditches to receive and convey the surplus water so desired by him, and pay or tender to the person having the right to the use, sale or disposal thereof an amount equal to the necessary cost and expense of tapping any gulch, stream, reservoir, ditch, flume or aqueduct, and putting in gates, gauges or other proper and necessary appliances usual and customary in such cases, and, until the same shall be so done, the delivery of the said surplus water shall not be required as provided in the preceding section.

[Right of Consumers—Enforcement.]

§ 1899. Any person constructing the necessary ditches, aqueducts or flumes, and making the payments or tenders hereinbefore provided, is entitled to the use of so much of the said surplus water as said ditches, flumes or aqueducts have the capacity to carry, and for which payment or tender is made, and may institute and maintain any appropriate action at law or in equity for the enforcement of such right or recovery of damages arising from a failure to deliver or wrongful diversion of the same.

[Right Limited.]

§ 1900. Nothing in the three preceding sections shall be so construed as to give the person acquiring the right to the use of water as therein provided the right to sell or dispose of the same after being so used by him, or prevent the original owner or proprietor from retaking, selling and disposing of the same in the usual and customary manner, after it is so used as aforesaid.

See generally, as to irrigation corporations, sections 393 (31), 403 (6).

DISTRIBUTION OF WATER BY COMMISSIONER.

[Act of March 2, 1899.]

§ 1. Whenever the water rights pertaining to any stream or water system within the state of Montana have been determined by a decree of a competent court, it shall be the duty of the district judge of the district within which such water rights are situated, upon the application of the owners of at least twenty-five per cent of the water rights affected by such decree, to appoint a commissioner, who shall have the author-

ity to measure and distribute to the parties interested under such decree the waters to which they are entitled, according to their priority as established by such decree; and for that purpose such commissioner shall have authority to enter upon any ditch, canal, aqueduct or other source for conveying the waters affected by such decree, and to visit, inspect and adjust all headgates or other means of distributing such waters; and shall have the same power as a sheriff or constable to arrest any and all persons interfering with the distribution made by him, and to take such persons so arrested before the judge of the district court for trial for contempt of the decree of said court.

§ 2. Provides for fees and compensation of commissioners to be fixed by the judge, and apportioned among the users of water rights.

§ 3. Provides that a commissioner failing to perform the duties imposed upon him by the court shall be deemed guilty of contempt. [Laws 1899, pp. 136, 137.]

Measurement of Water.

[Act March 3, 1899.]

§ 1. Hereafter a cubic foot of water (7.48 gallons) per second of time shall be the legal standard for the measurement of water in this state.

§ 2. Where water rights expressed in miners' inches have been granted, one hundred miners' inches shall be considered equivalent to a flow of two and one-half cubic feet (18.7 gallons) per second; two hundred miners' inches shall be considered equivalent to a flow of five cubic feet (37.4 gallons) per second, and this proportion shall be observed in determining the equivalent flow represented by any number of miners' inches.

§ 3. Provided, that the provisions of this bill shall not affect or change the measurement of water heretofore decreed by a court, but such decreed water shall be measured according to the law in force at the time such decree was made and entered. [Laws 1899, p. 126, repealing Civ. Code, § 1893.]

MISCELLANEOUS PROVISIONS.

[References to Civil Code 1895.]

[Adjudication of Priorities.]

§ 1891. See the text, section **107**.

[Dams and Reservoirs to be Securely Constructed.]

§ 1901. No person shall hereafter fill, or procure to be filled, with water, any dam or reservoir which is not so thoroughly and substantially constructed as that it will safely and securely hold the water to be turned therein.

§ 1902. No person shall hereafter construct, or cause to be constructed, on a stream, any dam or reservoir to accumulate the waters thereof, except in a thorough, secure and substantial manner.

[Protection of Highways.]

§§ 1895, 1896. These sections require persons constructing ditches, etc., over or across public roads or highways, to protect such roads or highways from injury by keeping the ditches, etc., in good repair by bridging or otherwise, and prescribe a penalty for failure to do so.

[Taking Water from or Obstructing Canals.]

Pen. Code, § 1034. This section is substantially the same as Pen. Code Cal. § 592.

[Destroying or Injuring Dams, Canals, etc.]

Pen. Code, § 1058. This section provides a penalty for willfully and maliciously injuring or destroying dams, canals, reservoirs, etc.

NEBRASKA.

The Nebraska constitution contains no provision on the subject of irrigation.

[References to Compiled Statutes 1899.]

This compilation contains the statutes found in the latest revision of the statutes. Several sections of the earlier revision relating to appropriation have been repealed, the appropriation act having been declared unconstitutional. See text, section 24. Notwithstanding this decision, most of the sections relating to appropriation have been retained.

General Provisions as to Appropriation of Water.

[Water Public Property.]

§ 5485. The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation, as hereinbefore provided.

[Water for Irrigation a Natural Want.]

§ 5508. Water for the purposes of irrigation in the state of Nebraska is hereby declared to be a natural want.

[Right of Appropriation—Priority.]

§ 5486. This section is a copy of Const. Colo. art. 16, § 6. See section 5495, infra.

[Appropriation must be for Useful Purpose.]

§ 5461. All appropriations for [of] water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.

[Priority of Appropriation.]

§ 5443. As between appropriators, the one first in time is first in right.

[Appropriation of Waste and Seepage Water.]

§ 5487. This section is practically identical with Mills' Ann. St. Colo. § 2269.

[Change of Place of Diversion.]

§ 5441. The person, company or corporation entitled to the use may change the place of diversion if others are not injured by such change, and may extend the ditch, flume or aqueduct by which the diversion is made to places beyond that where the first use was made.

[Turning Water into Natural Stream.]

§ 5442. The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated, unless such stream exceeds in width one hundred (100) feet, in which event not more than seventy-five (75) per cent. of the regular flow shall be taken.

[Use of Natural Stream as Channel.]

§ 5488. This section authorizes the use of natural streams or channels as a conduit for water appropriated, upon certain conditions.

RIGHT OF WAY FOR DITCHES, ETC.

[Right of Way may be Condemned.]

§ 5482. All persons, companies or associations desirous of constructing a ditch, building a dam, or dams, for the purpose of storing water for irrigation, evaporation and water-power purposes, or conveying water to be applied to domestic, agricultural or any other beneficial use, or any dam, dike, reservoir, waste way, subterranean gallery, filtering wells, or other works for collecting, cleansing, filtering, retaining or storing water for any such use, or to enlarge any such ditch, conduit or waterworks, or to change the course thereof in any place, or to relocate the headgate, or to change the point at which the water is to be taken into such canal or other water-works, or to enlarge any ditch, canal or other works theretofore constructed by any other person, company, corporation or association, or to construct any ditch, or to lay pipes or conduits for conveying or distributing water so collected or stored to the place of using the same, or to set, place or construct a wheel, pump, machine or apparatus for raising water out of any stream, lake, pond or well, so that the same may flow or be conveyed to the place of using or storing the same, and who shall be unable to agree with the owner or claimant of any lands necessary to be taken for the site of any such works, or any part thereof, touching the compensation and damages, shall be entitled to condemn the right of way over or through the lands of others for any and all such purposes.

[Condemnation Proceeding.]

§ 5484. This section provides the mode of procedure in condemnation proceedings.

[Only One Ditch when Practicable.]

§ 5440. No tract of land shall be crossed by more than one ditch, canal or lateral without the written consent and agreement of the owner thereof, if the first ditch, canal or lateral can be made to answer the purpose for which the second is desired or intended.

[Right of Way over Public Lands.]

§ 5483. All persons, companies, corporations or associations being desirous of constructing any of the works provided for in the preceding sections shall have the right to occupy state lands, and to obtain right of way over and through any highway in any county in this state for such purposes, without any compensation therefor.

Duties of Ditch Owners.

[Ditch Owner to Maintain Embankments.]

§ 5502. The owner or owners of any irrigation ditch or canal shall carefully maintain the embankments thereof so as to prevent waste therefrom, and shall return the unused water from such ditch or canal with as little waste thereof as possible to the stream from which such water was taken, or to the Missouri river.

[Ditches Crossing Highways to be Bridged.]

§ 5501. This section requires the owners of ditches or canals upon or across highways to keep such highways open for safe and convenient travel, and to construct bridges as prescribed.

[Ditch Owner to Prevent Overflow on Road.]

§ 5503. This section requires ditch owners to prevent

overflow from their ditches upon any road or highway, and prescribes a penalty for violation of this provision.

[Duty to Construct Headgates and Measuring Devices—Maps of Canals.]

§ 5480. This section requires appropriators to maintain substantial headgates, and, when required by the under secretary of the division, a flume or measuring device near the head of the ditch, and provides for the construction thereof by the county board, at the cost of the ditch owner, upon the failure of the latter to put in such headgate or measuring device when required to do so by the under secretary. The section also requires every person, corporation or association owning or controlling a canal, within 90 days after notification from the state board, to file with such board a map or plat of the canal, and such other information as the board may deem proper.

[Requirements as to Ditches Crossing Land of Another.]

§ 5494. This section provides that any person, company, corporation or association constructing a ditch or canal through the lands of another, having no interest in such ditch or canal, shall build the same in a substantial manner, so as to prevent damage to such land, and construct bridges across the ditch or canal when necessary, and erect and keep in order suitable gates at the point of entrance and exit of the ditch through any inclosed field.

[Construction of Outlets—Appropriation of Water.]

5495. This section is substantially the same as Mills' Ann. St. Colo. § 2288, but provides in addition that "the right to the use of running water flowing in any river or stream, or

down any canyon or ravine, may be acquired by appropriation by any person, company, corporation or association organized under the laws of the state of Nebraska."

[Duty of Ditch Owner to Appoint Superintendent.]

§ 5496. This section is substantially the same as Mills' Ann. St. Colo. § 2289, but provides in addition that the superintendent may cause gates to be locked, and may retain the keys.

[Liability of Superintendent for Failure to Deliver Water.]

§ 5500. This section is substantially the same as Mills' Ann. St. Colo. § 2290, omitting that portion following the word "month."

[No Person to Receive More Water Than He is Entitled to.]

§ 5497. Copied from Mills' Ann. St. Colo. § 2395.

[Duty of Person Receiving Excess of Water.]

§ 5498. Substantially the same as Mills' Ann. St. Colo. § 2396.

[Change of Line of Canal—Water to be Kept Flowing.]

§ 5489. That whenever any ditch or canal has been constructed for the purpose of conveying or selling water for irrigation purposes, it shall be unlawful for the owner or owners of said ditch or canal to change the line of said ditch or canal so as to interfere with the use of water from said ditch or canal by any one who, prior to the proposed change, had used water for irrigation purposes from said ditch or canal;

and it is hereby made the duty of the owner or owners of any such ditch or canal to keep the same in good repair, and to cause the water to flow through the said ditch or canal to the extent of its capacity during the period between April 15th and November 1st each year, if the same be demanded, and the supply at its source be sufficient, and, for a failure to cause the water to flow as aforesaid, the owner or owners or lessees of any such ditch shall be liable to any one for any damage resulting from such a failure, and, in addition to such personal liability, such damage shall be a lien upon such ditch or canal, which lien continues in force until such damages are paid, unavoidable accidents excepted.

Storage of Water.

[Right to Store Water—Liability of Reservoir Owner.]

§ 5499. Any person, company or corporation desirous of constructing and maintaining a reservoir for the purpose of storing water for irrigation purposes shall have the right to take water from the natural streams of this state when not needed for immediate use for irrigation or domestic purposes; to construct and maintain ditches for the purpose of conducting water to and from such reservoirs, and to condemn land for such reservoirs and ditches in the same manner as is provided by law for the condemnation for right of way for ditches; and the owner or owners of such reservoirs shall be liable for all damages arising from leakage or overflow of the water therefrom, and by the breaking of the embankments of such reservoir.

[Dams.]

§ 5481. This section provides that dams for reservoir purposes or across running streams, when above ten feet in

height, shall not be constructed until a plan of the same shall have been submitted to and approved by the state board of irrigation.

Public Control of Irrigation.

A system of public control similar to that of Wyoming [see text, section 122] is provided for. The state is divided into two water divisions [sections 5444-5446], and a state board of irrigation, composed of the governor, attorney general and commissioner of public lands and buildings, is created [sections 5447-5449], and their powers and duties are prescribed. These are substantially the same as those of the Wyoming board of control.

The board of irrigation shall elect an under secretary for each water division, who shall hold office for two years, and must reside in his division. He has the supervision and control of the distribution of water in his division. [Sections 5424-5457.]

Provision is made for the establishment of water districts, as in Wyoming, and the appointment of one "under assistant" for each district, this officer corresponding to the water commissioners of Wyoming. [Sections 5476-5479.]

Persons desiring to appropriate water are required to make application to the state board for a permit to do so. Sections 5471-5473. See, also, sections 5474, 5505.

Irrigation Companies.

[Mutual Irrigation Companies.]

§ 5509. **Any corporation** or association organized under the laws of this state for the purpose of constructing and operating canals, reservoirs and other works for irrigation

purposes, and deriving no revenue from the operation of such canal, reservoir or works, shall be termed a "mutual irrigation company," and any by-laws adopted by such company prior to or after the passage of this act, not in conflict herewith, shall be deemed lawful, and so recognized by the courts of this state: provided, such by-laws do not impair the rights of one shareholder over another.

[Assessment of Shares of Corporations.]

§ 5510. This section provides that corporations or associations organized for the purpose of constructing or operating canals, etc., for irrigation purposes may assess the shares, stock or interest of the stockholders for running expenses.

[Water Companies may Borrow Money.]

§ 5490. This section authorizes companies operating canals, etc., to borrow money, and to mortgage their property, issue bonds, etc.

MISCELLANEOUS PROVISIONS.

[What are Irrigation Canals.]

§ 5439c. Any canal constructed for the purpose of developing water power, or any other useful purpose, and for which water can be taken for irrigation, is hereby declared to be an irrigation canal, and all laws relating to irrigation canals shall be deemed applicable thereto.

[Canals, etc., Internal Improvements.]

§ 5491. Canals and other works constructed for irrigation or water power purposes or both are hereby declared to be works of internal improvement, and all laws applicable to

works of internal improvement are hereby declared to be applicable to such canal and irrigation works.

[Canals, etc., Exempt from Taxation.]

§ 5504. All ditches, canals, laterals or other works used for irrigation purposes shall be exempt from all taxation, whether state, county or municipal.

[Wasting Mutual Artesian Water.]

§§ 5443a-5343c. These sections prohibit the waste of water from artesian wells, and provide a penalty for violation of this prohibition.

[Measurement of Water.]

§ 5475. A cubic foot of water per second of time shall be the legal standard of the measurement of water in this state, both for the purpose of determining the flow of water in the natural streams, and for the purpose of distributing therefrom: provided, however, that water heretofore sold by the miners' inch shall continue to be delivered in that way. [The section further prescribes the mode of measuring water so sold, the requirements being substantially the same as Mills' Ann. St. Colo. § 4643.]

[Interfering With or Injuring Ditches, etc.]

§ 5493. This section provides a penalty for unlawfully interfering with dams, headgates, etc., or injuring ditches, etc., or stealing water therefrom.

[Deeds and Contracts for Water Rights.]

§ 5506. Whenever any person, persons or corporation owning any irrigation ditch or canal shall convey by deed or

contract the right to use the water from such ditch or canal for any tract of land for irrigation purposes, such deed or contract shall be recorded in the county where such land is situated, in the same manner and under the same conditions as deeds for real estate are recorded; and such deed or contract, from the date of recording thereof, shall be binding upon the grantor of such deed or contract, his, their or its successors or assigns, and all persons, companies or corporations claiming any interest in such ditch or canal, and no foreclosure or other proceedings to collect money from or subject the sale of the property of the owners of such ditch or canal shall in any manner impair the right of such grantee, his heirs, administrators or assigns, to the use of the water from such ditch or canal, in the quantity and manner provided in such deed or contract.

NEVADA.

[References to Compiled Laws 1900.]

Nevada has no constitutional provisions relating to irrigation. There have been several statutes on the subject, notably the act of 1891, providing for the organization of irrigation districts [sections 374-423], and the general statute of 1899. The provisions of the latter as to public control of irrigation have been referred to in the text [section 123]. The other provisions of this act and the other statutes are here given.

GENERAL PROVISIONS.

[Water Property of State.]

§ 354. All natural watercourses and natural lakes, and the waters thereof, which are not held in private ownership, belong to the state, and are subject to regulation and control by the state.

[Right to Water Usufructuary Only.]

§ 356. There is no absolute property in the waters of a natural watercourse or natural lake. No right can be acquired to such waters except as usufructuary right,—the right to use it, or to dispose of its use, for a beneficial purpose. When the necessity for the use of the water does not exist, the right to divert it ceases, and no person shall be permitted to divert or use the waters of a natural watercourse or

lake except at such times as the water is required for a beneficial purpose.

[Water must be Economically Used—Return of Surplus to Channel.]

§ 357. No person shall be permitted to divert or use any more of the waters of a natural watercourse or natural lake than sufficient, when properly and economically used, to answer the purpose for which the diversion is made; nor shall any person be permitted to waste any such water, and all surplus water remaining after use, unavoidable wastage excepted, shall be returned to the channel by the persons diverting the same, without unreasonable delay or detention.

[Change of Place of Diversion.]

§ 358. Any person who has acquired the right to use the water for a beneficial purpose may change the place of diversion and manner of use, provided such change does not substantially injure the rights of others.

[Priority Acquired Only in the Manner Provided by Statute.]

§ 359. The prior right to the use of the unappropriated waters of the natural watercourses and natural lakes, as defined in this act, may be acquired in the manner provided in this act, and not otherwise.

[Use of Natural Stream for Conducting Water.]

§ 424. Any water stored for irrigation or other beneficial purposes may be turned into the channel of any natural stream or watercourse, and mingled with its waters, and then be reclaimed, but, in reclaiming it, water already appropriated by others shall not be diminished in quantity.

[Exisiting Rights Protected.]

§ 355. All existing rights to the use of water, whether acquired by appropriation or otherwise, shall be respected and preserved, and nothing in this act [of 1899] shall be construed as enlarging, abridging or restricting such rights.

CONSTRUCTION OF DICTHES, ETC.

[Certificate to be Filed.]

§ 425. By the act of 1866 it was provided that any person desiring to construct and maintain a ditch or flume should make, sign and acknowledge a certificate specifying the name of the ditch or flume, and the names of the places constituting its termini; such certificate and a plat of the proposed ditch or flume to be recorded. The work of constructing such ditch or flume shall be commenced within thirty days of the time of making such certificate, and shall be continued with all reasonable dispatch until completed.

[Right of Way of Ditches, etc.]

§ 426. By this act it was provided that persons desiring to construct a ditch or flume should have the right to enter upon private lands for the purpose of examination and survey, and might appropriate so much of such land as might be necessary for a right of way, upon the payment of compensation, to be determined by appraisers. See, also, section 428.

§ 429. By the act of 1887, a similar right was granted for the construction of waste ditches to carry off surplus water.

[Ditch Owner Entitled to Undisturbed Right of Flowing Water Through Ditch.]

§ 427. Persons constructing or maintaining a ditch or flume are further granted the undisturbed right and privi-

lege of flowing water through the same, and to use the same along the line of such ditch or flume.

MISCELLANEOUS PROVISIONS.

[Unlawful Diversion and Waste of Water.]

§§ 430, 431. These sections define and provide a penalty for the unlawful use and waste of water during the irrigating season.

[Obstruction or Pollution of Water.]

§§ 432-434. By these sections it is made a misdemeanor for the owners of sawmills, slaughter houses, breweries or tanneries to obstruct or pollute the flow of water of streams, and a right of action given to landowners injured by a violation of the act. See, also, sections 4835, 4836, 4979-4981.

[Unit of Measure.]

§ 360. In all measurements of water in this state, a cubic foot of water per second of time shall be the standard of measurement.

NEW MEXICO.

The laws of New Mexico on the subject of water rights consist of the general title "Acequias," comprising sections 1 to 63 of the Compiled Laws of 1897, and the provisions relating to irrigation corporations, comprising sections 467 to 494. The law of acequias, so far as irrigation is concerned, is very similar to that of Arizona, and it is therefore deemed sufficient to present here merely a brief abstract.

GENERAL PROVISIONS.

All the inhabitants of the territory have the right to construct acequias and take water for the same from wherever they can, compensation being made for land taken for such purpose, the amount of such compensation to be determined in a manner prescribed. Sections 23-29. No compensation shall be allowed in the case of a ditch constructed by a community of people owning all the land upon which the ditch is constructed. Section 4. The course of established ditches shall not be disturbed. Section 5. All acequias are the property of the persons constructing them, and others may not use water therefrom except by permission and upon payment of a proportionate share of the cost of construction. Section 21. The impediment of irrigation, as by the construction of mills, etc., is prohibited, as irrigation is preferred to all other uses of water. Section 1. Interference with acequias, or the unauthorized use of water therefrom, is a misdemeanor. Sections 13, 36. Provision is made for

the protection of land or other property by water from ditches, etc. Sections 18, 19, 37, 38. Provision is made for the organization of irrigation companies, and their powers and duties are defined. Sections 467-494. Every person, association or corporation constructing or enlarging any ditch, canal or feeder for any reservoir, and taking water from any natural stream, is required, within 90 days after the commencement of such work, to file and cause to be recorded in the office of the probate clerk of the proper county a sworn statement in writing, showing certain prescribed particulars as to such work, and no priority of right shall attach to any such construction, change or enlargement until such record is made. Section 493.

PUBLIC DITCHES OR ACEQUIAS.

All rivers and streams of water in the territory formerly known as public ditches or acequias are established and declared to be public ditches or acequias. Section 6. Community ditches are ditches not private and not incorporated, and are held and owned by two or more persons as cotenants. Section 14. All community ditches or acequias are to be considered as corporations, or bodies corporate, with power to sue or be sued as such. Section 8. The officers of such community ditches or acequias are three commissioners and one mayordomo, or superintendent, each of whom must be interested in the ditch or water therein; the mode of election of such officers being prescribed. Sections 9, 10. Persons interested in public ditches or acequias are required to labor thereon, the regulation of such labor being minutely prescribed. Sections 11, 12, 32-35, 39-45. Pueblo Indians are required to work on acequias. Section 1876. Public

and community ditches crossing highways are required to be bridged. Sections 15, 46-48. Mayordomos are liable to fine for misconduct or neglect of duty. Sections 30, 49.

NORTH DAKOTA.

CONSTITUTIONAL PROVISIONS.

[Streams Property of State.]

§ 210. All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and agricultural purposes.

STATUTORY PROVISIONS.

Earlier legislation having been repealed, the statutes now in force in this state consist of several sections in the Revised Codes of 1899, and an act passed by the legislature of 1899.

GENERAL PROVISIONS.

[Act 1899; Laws 1899, p. 246.]

[Right to Use of Water Granted.]

§ 1. Any person or persons, corporation or company, who may have or hold a title or possessory right or title of any mineral or agricultural lands within the boundaries of this state, shall be entitled to the usual enjoyment of the waters of the streams or creeks in said state for mining, milling, agricultural or domestic purposes: provided, that the right to such use shall not interfere with any prior right or claim to such waters, when the law has been complied with in doing the necessary work.

[**Extent of Right.**]

§ 5. The waters of the streams or creeks of this state may be made available to the full extent of the capacity thereof for mining, milling, agricultural or domestic purposes, without regard to deterioration in quality or diminution in quantity, so that the same do not materially affect or impair the rights of the prior appropriator.

[**Procedure of Appropriation.**]

§ 9. Any person or persons, corporation or company, appropriating the waters of any stream or creek in this state, shall turn the water from the channel at least twenty feet of ditch or flume within sixty days from the date of appropriation, and turn the water therein, and construct at least twenty rods of said ditch, flume or dyke if needed within six months from the date of such appropriation, and turn the water therein, and within thirty days from the date of location, the locator or locators of such water right shall file a location certificate, together with a map showing the proposed dam or dams, ditches or dykes, flumes or canals, giving the description of the location by legal subdivision or by metes and bounds thereof, with the register of deeds in the proper county within which such water right is located and situated. A copy of such certificate shall be posted at or near the head of such ditch, flume or canal, and shall contain the name of the locators, the date of location, number of inches of water claimed or appropriated, and the purpose of the appropriation, and in no case shall the number of inches of water claimed exceed the carrying capacity of the first twenty feet of the flume, ditch or canal. Nor shall said ditch, flume or canal be enlarged to the prejudice or injury of a subsequent appropriator before such enlargement.

[Construction of Works.]

§ 10. On failure to commence construction of any such dam, ditch, flume, dyke or canal, or any of them, within 60 days from date of filing of location, and prosecute such dam, ditch, flume or dyke to a final completion without unnecessary delay, such appropriation shall be deemed abandoned.

[Priority of Appropriation.]

§ 4. In all controversies respecting rights of water under the provisions of this act, the same shall be determined by the date of appropriation as respectively made by the parties, whether for mining, milling, agricultural or domestic purposes.

[Right of Way.]

§§ 2, 3, 6. By these sections, the necessary right of way across the lands of others for ditches, etc., is granted, the right being limited by the necessity of the case, and the person exercising it being made liable to the party injured for actual damage.

[Vested Rights Protected—Duty to Bridge Ditch Crossings.]

§ 7. This act shall not be so construed as to impair or in any way or manner interfere with the rights of parties to the use of the waters of such streams or creeks acquired before the passage of this act: provided, that all water rights or ditches that have not been used or worked upon for one year next prior to the passage of this act shall be deemed abandoned and forfeited, and subject to appropriation anew. Any person or persons, corporation or company, who may dig any ditch, canal, dyke or flume, or erect any dam, over and across any public road, trail or highway, or who use the wa-

ters of any such dam, ditch, dyke or canal, shall be required to bridge the same and keep the same in good repair at such crossing or other places where the water from any such ditch, dyke, dam, flume or canal may flow over or in any way injure any road, trail or highway, either by bridge or otherwise.

§ 8. This section provides for the recovery of a penalty for violation of the preceding section.

[Irrigation by Township.]

Rev. Codes 1899, §§ 2665-2667. These sections provide that, upon the petition of ten legal voters of any organized township, the township board shall submit to the votes of the township the question of irrigation by building dams to create ponds or reservoirs on any of the creeks or coulees in the township, and if the question be decided in favor of the proposed works by a two-thirds vote, it shall be lawful for such voters to levy a tax, not exceeding two mills on the dollar of the assessed valuation of the township, to be expended by and under the direction of the board of supervisors.

[Unlawful Diversion of Water.]

§ 7554. It shall be unlawful for any person to divert any of the waters from any irrigation ditch in this state, or to interfere in any manner whatever with any irrigation ditch, without first having obtained the permission of the owner of such ditch, or of the person or persons lawfully in charge thereof.

§ 7555. Violation of the preceding section is made a misdemeanor, punishable by a fine of not less than $25, nor more than $50; any justice of the peace of the county where the offense was committed being given jurisdiction thereof.

OREGON.

[References to Hill's Ann. Laws 1892.]

The constitution of Oregon contains no provisions on the subject of irrigation. An amendment on the subject was submitted to the people at the election of June, 1900, but was defeated. The statutory law consists of the act of 1891, regulating the appropriation of water by corporations and a few scattered sections. There are no provisions applying to the appropriation of water by individuals for private use. The act of 1891 is here given by sections, the other provisions being introduced under appropriate heads.

GENERAL PROVISIONS.

[Use of Water for General Distribution a Public Use.]

§ 1. The use of the water of the lakes and running streams of the state of Oregon for general rental, sale or distribution for purposes of irrigation, and supplying water for household and domestic consumption, and watering live stock, upon dry lands of the state, is a public use, and the right to collect rates or compensation for such use of said water is a franchise. A use shall be deemed general, within the purview of this act, when the water appropriated shall be supplied to all persons whose lands lie adjacent to or within reach of the line of the ditch or canal or flume in which said water is conveyed, without discrimination other than priority of contract, upon payment of charges therefor, as long as there may be water to supply. [Laws, p. 1930.]

[General Powers of Corporations as to Appropriation of Water, etc.]

§ 2. A corporation organized for the construction and maintenance of a ditch or canal or flume for general irrigation purposes, and other purposes above prescribed, may appropriate and divert water from its natural bed or channel, and condemn right of way for its ditch or canal or flume, and may condemn the rights of riparian proprietors upon the lake or stream from which such appropriation is made, upon complying with the terms of this act. Such corporation shall also have the right to condemn lands for the sites of reservoirs for storing water for future use, and for rights of way for feeders carrying water to such reservoirs, and for ditches carrying the same away, and distributing ditches, and shall have the right to take from any running stream in this state, and store away, any water not needed for immediate use by any person having a superior right thereto.

[Condemnation of Water Rights.]

§ 8. Such corporations are given the power to condemn the water rights of riparian owners, but it is provided that no riparian owner shall, without his consent, be deprived of water for household or domestic use, or for watering his stock, or of water necessary to irrigate crops growing on his riparian lands, and actually used therefor.

[Abandonment of Water Right.]

§ 22. The right to appropriate water hereby granted may be lost by abandonment; and if any corporation constructing a ditch or canal or flume under the provisions of this act shall fail or neglect to use the same for the period of one year at any time, it shall be taken and deemed to have

abandoned its appropriation, and the water appropriated shall revert to the public, and be subject to other appropriations in order of priority. But the question of abandonment shall be one of fact, to be tried and determined as other questions of fact.

PROCEDURE OF APPROPRIATION.

[Notice of Appropriation to be Posted.]

§ 4. When a point of diversion shall have been selected, such corporation shall post in a conspicuous place thereat a notice in writing containing a statement of the name of the ditch or canal or flume, and of the owner thereof, the point at which its headgate is proposed to be constructed, a general description of the course of said ditch or canal or flume, the size of the ditch or canal or flume, in width and depth, the number of cubic inches of water, by miners' measurement, under a six-inch pressure, intended to be appropriated, and the number of reservoirs, if any.

[Notice and Map to be Recorded.]

§ 5. This section provides that, within ten days after posting the above notice, a similar notice, together with a map showing the general route of the ditch, etc., shall be filed for record with the county clerk or recorder of the proper county; and within sixty days after the completion of such ditch, etc., a map of definite location thereof shall be filed.

[Construction of Works.]

§ 9. Within six months from the date of the posting of the notice above prescribed, the corporation proposing to appropriate the water therein mentioned shall commence the

actual construction of its proposed ditch or canal or flume, and shall prosecute the same without intermission, except as resulting from the act of God, the elements, or unavoidable casualty, until the same be completed; and the actual capacity of said ditch or canal or flume, when completed, shall determine the extent of the appropriation, anything contained in the notice to the contrary notwithstanding. Upon a compliance with the provisions of this act, the right to the water appropriated shall relate back to the date of posting said notice.

RIGHT OF WAY FOR DITCHES, ETC.

[Right of Entry for Location and Survey.]

§ 3. Such corporation may enter upon any land for the purpose of locating a point of diversion of the water intended to be appropriated, and upon any land lying between such point and the lower terminus of its proposed ditch or canal or flume, for the purpose of examining the same, and of locating and surveying the line of such ditch or canal or flume, together with the lines of necessary distributing ditches and feeders for reservoirs, and to locate and determine the sites for reservoirs for storing water.

[Condemnation of Right of Way.]

§ 6. When such corporation shall have acquired the right to appropriate water in the manner hereinbefore provided, it may proceed to condemn lands and premises necessary for right of way for its ditch or canal or flume, and likewise for its distributing ditches and feeders, and for sites for reservoirs; but right of way for the main line of said ditch or canal or flume shall not exceed one hundred feet in width, and for each distributing ditch or feeder thirty feet in width,

and for a site for each reservoir twenty acres from one owner, or for every ten thousand inches of water, miners' measurement, as aforesaid, or fraction thereof over half, of the capacity of the main ditch or canal or flume, for every twenty miles of its length.

§ 7. This section provides that when the corporation is unable to agree with the landowner as to the compensation to be paid for the land taken, or if such owner be absent from the state or incapable of acting, the corporation may maintain an action in the circuit court of the county in which the land is situated for the condemnation of the land, the condemnation proceedings to be in accordance with the prescribed mode of condemnation of lands by private corporations.

[Shortest Route to be Chosen.]

§ 12. Whenever any corporation organized as aforesaid shall find it necessary to construct its ditch or canal, flume, distributing ditches or feeders across the improved or occupied lands of another, it shall select the shortest and most direct route practicable, having reference to cost of construction, upon which such ditch or canal, flume, distributing ditches or feeders can be constructed with uniform or nearly uniform grade.

[Joint Grade, Use of Ditches.]

§ 13. This section, as originally enacted, began with a provision, copied from Mills' Ann. St. Colo. § 2261, that improved or occupied land should not be crossed by two or more ditches when one would suffice. This part of the section was recently repealed, and the remainder of the section re-enacted. This provides that any corporation having constructed a

ditch, canal or flume shall allow any other corporation to enlarge the same, and use it jointly with the owner, upon payment to the latter of a reasonable proportion of the cost of constructing and maintaining such ditch, canal or flume; such corporation to be jointly liable to any person damaged along the line of common user by reason of the faulty construction of such portion of such ditch, canal or flume, and the corporation securing the use of the same shall be liable to the owner corporation for all damage by it sustained growing out of the enlargement of said ditch, canal or flume, or the increased volume of water turned therein. Before proceeding to secure the right to make use of a ditch, canal or flume, the corporation seeking to do so shall execute to the owner corporation a bond securing its liability as above stated. [Laws 1899, p. 201.]

[Use of Natural Channels.]

§ 14. Any corporation constructing a ditch or canal, flume, distributing ditches or feeders, under the provisions of this act, may make use of natural depressions in the earth along the line thereof to all intents and purposes as parts of said ditch or canal, flume, distributing ditches or feeders; and it may conduct the water appropriated along the channel of any natural stream, but not so as to raise the water thereof above ordinary high-water mark, and may take the same out again at any point desired, without regard to the prior rights of others to water from the same stream; but due allowance shall be made for evaporation and scapage [seepage.]

[Extending Headgate Up Stream—Change of Channel.]

§ 11. This section is copied from Mills' Ann. St. Colo.

§ 2264, but provides, further, that when, from any cause, the line of any ditch, canal, flume or feeder, as originally constructed, can no longer be maintained, the corporation owning the same may alter the course thereof, and for such purpose condemn lands for right of way, as in case of original construction.

[Right of Way on State Lands.]

By chapter 75 of the Miscellaneous Laws, a right of way for the construction of a water ditch for irrigation or other purposes is granted to individuals or corporations who may construct such ditches over state lands, for a distance of twenty-five feet on each side of such ditch. Misc. Laws, §§ 4058-4060. By section 25 of thé act of 1891, a right of way to the extent specified in section 6 is granted to corporations appropriating water under the act, across all lands belonging to the state, and not under contract of sale.

Duties and Liabilities of Corporation.

[Duty to Maintain Headgate.]

§ 15. This section is copied from Mills' Ann. St. Colo. § 2285.

[Bridging Ditches Crossing Public Highways.]

§ 17. This section is a combination of Mills' Ann. St. Colo. §§ 2276, 2277, 2281, and requires the corporation to construct over its ditch or canal where it crosses a public highway a substantial bridge not less than 14 feet in width, such bridge to be completed, without interruption of travel, within three days from the time the highway is intersected. If not so constructed by the corporation, the road overseer shall construct the bridge, and bring an action as supervisor

to recover the expense of construction, with costs and disbursements and reasonable attorney fees.

[Duty to Maintain Embankments.]

§ 18. Every corporation constructing a ditch or canal or flume under the provisions of this act shall carefully keep and maintain the embankments and walls thereof, and of any reservoir constructed to be used in conjunction therewith, so as to prevent the water from wasting and from flooding or damaging the premises of others; and it shall not divert at any time any water for which it has not actual use or demand.

[Liability for Damages from Ditches.]

§ 16. Every corporation constructing a ditch or canal, flume or reservoir, under the provisions of this act shall be liable for all damages done to the persons or property of others arising from leakage or overflow of water therefrom growing out of want of strength in the banks or walls, or negligence or want of care in the management of said ditch or canal, flume or reservoir: provided, that damage resulting from extraordinary and unforeseen action of the elements, or attributed in whole or in part to the wrongful interference of another with said ditch or canal, flume or reservoir, which may not be known to said corporation for such length of time as would enable it, by the exercise of reasonable efforts, to remedy the same, shall not be recovered against said corporation.

Supplying Water to Consumers.

[Distributing Ditches—Duty to Furnish Water to Consumers.]

§ 19. Such corporation may acquire the right of way

across lands lying contiguous to its ditch or canal or flume, for distributing ditches, in the manner hereinbefore provided, but it shall not be compelled so to do, nor to construct distributing ditches upon any lands for the use of the owners thereof. But when any person shall construct a distributing ditch to the line of the right of way for the ditch or canal or flume at any practicable point, and shall tender to such corporation the rates usually charged consumers of water along the line of said ditch or canal or flume, for any amount of water said corporation may have in its ditch or canal or flume, or may have the right and ability to appropriate above the amount already sold, said corporation shall connect such distributing ditch with its ditch or canal or flume, and turn therein the amount of water for which tender is made, and if it shall fail or refuse so to do, it shall be liable to such person for all loss or damage sustained by reason of the failure to procure such water. Such corporation shall not be liable for all loss or damage sustained by any person by reason of the defective condition or careless operation of distributing ditches not by it constructed or operated, and not occasioned in whole or in part by its wrongful or negligent act.

[Lien on Crop.]

§ 20. Any corporation, acting under the provisions of this act, which shall supply water to any person for the irrigation of crops, shall have a lien upon all crops raised by the use of such water for the reasonable value of the water supplied, which lien shall be a continuing one, and shall bind said crops after as well as before the same have been gathered, and without record shall be preferred to all other liens or incumbrances upon said crops whatever. Such liens may be enforced by a suit in equity.

[Fixing Water Rates.]

§ 26. This act may at any time be amended by the legislative assembly, and commissioners for the management of water rights and the use of water may be appointed, and rates for the use of water may be fixed, by the legislative assembly or by such commissioners; but rates shall not be fixed lower than will allow the net profits of any ditch or canal or flume or system thereof to equal the prevailing legal rate of interest on the amount of money actually paid in and employed in the construction and operation of said ditch or canal or flume, or system thereof.

[Adjudication of Priorities.]

§ 24. In any suit which may hereafter be commenced for the protection of rights to water acquired under the provisions of this act, the plaintiff may make any or all persons who have diverted water from the same stream or source parties to such suit, and the court may in one decree determine the relative priorities and rights of all parties to such suit. Any person claiming a right on said stream or source, not made a party to such suit, may become such on application to the court, when it is made to appear that he is interested in the result of the suit, and may have his right determined; and the court may, at any stage, on its own motion, require any or all persons having or claiming rights to water on said stream or source to be brought in and made parties to said suit, when it appears that a complete determination of the issues involved cannot be made without the presence of such person or persons.

MISCELLANEOUS PROVISIONS.

[Injury to Ditches, etc.]

§ 23. Maliciously injuring the ditches, etc., of another, or taking water therefrom without the consent of the owner, with intent to steal the same, is made a misdemeanor, and the person so trespassing is also made liable to the party injured for damages.

[Ditches, etc., Real Estate—Conveyances.]

§ 21. All ditches or canals and flumes permanently affixed to the soil, constructed under the provisions of this act, are hereby declared to be real estate, and the same, or any interest therein, shall be transferred by deed only, duly witnessed and acknowledged. The vendee of the same, or any interest therein, at any stage, shall succeed to all the rights of his vendor, and shall be subject to the same liabilities during his ownership. See, also, Laws 1898, p. 18, § 9.

[Existing Appropriations Respected—Priorities.]

§ 10. By this section it is provided that all existing valid appropriations shall be respected and upheld, and that all controversies respecting rights to water under this act shall be determined by the date of the respective appropriations made thereunder by the parties.

[Appropriation of Waste and Seepage Water.]

This provision is identically the same as Mills' Ann. St. Colo. § 2269. [Laws 1893, p. 150, § 1.]

[Use of Wheels, etc., to Raise Water.]

Any person who owns or has the possessory right to any

land bordering on any lake or natural stream of water shall have the right to employ wheels, pumps, hydraulic engines or other machinery for the purpose of raising water to the level required for the use of such water in irrigating any land belonging to such owner: provided, that the use of such water shall not conflict with the better or prior right of any other person. [Laws 1893, p. 150, § 2.]

[Relative Preference to be Given the Several Uses of Water.]

When the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall, subject to such limitations as may be prescribed by law, have the preference over those claiming such water for any other purpose; and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. [Laws 1893, p. 150, § 3.]

Irrigation Districts.

By an act approved February 10, 1895, provision is made for the organization of irrigation districts, as in California. [Laws 1895, p. 13.]

SOUTH DAKOTA.

There is no constitutional provision in this state on the subject of irrigation. The statutes of South Dakota relating to irrigation are unlike those of the other states. The most conspicuous feature of the legislation of this state is the elaborate provision made for irrigation by means of artesian wells. [Ann. Codes 1899, § 2754 et seq.] Provision is also made for the appointment by the governor of a "state engineer of irrigation," whose powers and duties are prescribed. [Sections 2802-2812.] The other provisions are as follows:

Storage of Surface Waters.

§ 2906. That all surface waters in the state of South Dakota are hereby appropriated to the use and benefit of the public.

§§ 2907-2915. These sections provide for the construction of dams by the supervisors of each township for the storage of surface water.

§ 2915. Provided, that the law shall take effect only in such counties as shall adopt it by a majority vote at any election.

§§ 2916, 2917. These sections prescribe the manner of submitting the question to a vote of the voters of a county.

Storage of Surplus Water.

§ 2918. All surplus water above the normal amount in

lakes, rivers, creeks, or other bodies of water is hereby appropriated to the use and benefit of the people of this state.

§ 2919. The board of county commissioners in any county in the state of South Dakota shall, upon a petition signed by a majority of the legal voters of such county, to be determined by the poll books in the office of the auditor of said county, proceed to build dams across streams, to cut ditches, and otherwise prepare to and to store all surplus water, as described in section one of this act. [Section 2918.]

§ 2920. Any damage arising to adjacent property shall be settled in the manner prescribed by law for settling similar damages.

Reservoirs for Irrigation.

§ 2921. It shall be lawful for any person, company or corporation to construct and maintain, or permit to be constructed and maintained, a dam or dams upon and adjacent to their own lands, in any of the natural streams of the state, and to take from said streams any unappropriated water not needed for immediate use, for domestic and irrigating purposes, and also to construct and maintain, or permit to be constructed and maintained, reservoirs for the purpose of storing water, taken from said streams, to be used for irrigating agricultural lands; and to construct and maintain ditches, sluiceways, or waterways for carrying such water to and from such streams, or to and from such reservoirs, and to construct and maintain water wheels and machinery to be propelled by the waters of such stream or otherwise for the purpose of raising the water therefrom for the aforesaid purposes, or to keep, maintain and use other machinery and appliances for like purposes: provided, that

no dam shall be built or constructed so as to cause the waters of such stream to flow out of the natural channel or banks of such stream at its ordinary stage, and the party damaging or injuring the lands or possessions of another by reason of such dams or reservoirs shall be liable to the party injured for the actual damage occasioned thereby.

§§ 2922-2925. These sections prescribe details as to the construction of dams, etc., and the assessment of damages.

TEXAS.

GENERAL PROVISIONS.

[References to Sayles' Civ. St. 1900.]

The Texas constitution contains no provision on the subject of irrigation. The statutes consist of the act of 1852, regulating the mode of irrigation, and the act of 1895, providing for the appropriation of water, and superseding the prior acts of 1889 and 1893. [As to construction of such prior acts, see the text, section 25.]

REGULATION OF IRRIGATION BY COMMISSIONERS' COURTS.

[Commissioners' Court to Regulate Ditches, Etc.]

Art. 3108. The commissioners' courts are authorized to order, regulate and control the time, mode and manner of erecting, repairing, cleaning, guarding and protecting the dams, ditches, roads and bridges belonging to any irrigation farms and property, and the fences or other like protection in and around such farms: provided, that such farms, dams, ditches and fences be owned conjointly by two or more different persons: and further provided, that the same be situated outside of a corporation having jurisdiction thereof.

[General Powers of Court as to Regulation of Irrigation.]

Art. 3109. Said courts shall have power to establish all needful police regulations for the government and control of irrigation farms and property, and said courts may assess

and collect fines for breaches of any regulations established by them or by the joint owners of such farms and property, or recognized by said court as consistent with ancient usage and the law of the state; said courts may order meetings of joint owners for the election of commissioners and other officers, and for the consideration of any of their other interests, or the said court may proceed and elect said officers, and may regulate the right of way, the stoppage and passage of the water, and the right distribution of the shares of said water; they may forbid the running of stock at large on the common farm; they may fine for taking water out of turn, and for carelessness and wantonness in overflowing roads and neighboring lands; and generally they may do or cause to be done what they may consider just and needful or beneficial to the joint owners.

[Court may Lease Suerte of Delinquent.]

Art. 3110. If any owner of a suerte or subdivision lot in said farm shall fail or refuse to do or pay his proportion of labor and expense in and on any dam, ditches, fences, bridges or other needful appurtenances to such irrigation farms, the commissioners' court may lease said suerte: provided, that such leasing shall be at public outcry, after ten or more days of due public notice, and to the persons bidding the shortest term, not to exceed four years, who shall give good security to discharge faithfully all such charge and work.

[Court may License Irrigation.]

Art. 3111. Upon the application of the owners of any suitable lands and water, and the assurance and the proper security given to the county, if required by said court, that

no injury will result to the public health, the commissioners' courts are authorized by decree to license and permit any such owners to proceed and dam the water, and to ditch, fence and irrigate their lands: provided, that joint owners of all irrigation farms shall be liable for damages done to the public, or to any person, by reason of the overflow of such irrigation water; suit to be brought against the person occasioning the injury, or in such other way as may be sanctioned by said court.

[May Condemn Land for Ditches, etc.]

Art. 3112. If, in the establishment of any new project of irrigation, or the extension thereof, the commissioners' court deems it of sufficient importance to order a dam or ditch to be made on the lands of any person refusing to consent thereto, the said court, after giving such person actual notice in writing, and full hearing and consideration of his objections, may decree the making of the same, and shall depute two or more discreet and disinterested freeholders of the vicinage to arbitrate and fix the amount of damage permanently sustained by such person, which shall, by that or another such commission, be levied upon and paid forthwith by the applicants for such irrigation project, in the ratio of the interest and several shares of the said applicants and joint owners; and the said courts may, after like personal notice to parties interested, order the multiplication or extension of any ditches for irrigation, and of irrigation farms at and below, or at the sides of, such property, when it shall be the duty of such court to proceed and assess all just fines and equitable damages, and to fix and direct the rate and amount and kind of work, labor and tax to be paid

by any of such applicants and others, according to their interest.

[May Discontinue Ditches, etc.]

Art. 3113. Where the health of the public may be injured by irrigation or the damming up of water for any purpose, it shall be the duty of the commissioners' courts, after due and mature hearing and consideration, to decree the discontinuance, and they shall proceed and break up and discontinue all such dams, ditches and irrigation, whether the same have been heretofore ever so long in existence, or may be hereafter started.

[May Dispense with Fences in Certain Cases.]

Art. 3114. In counties where the commissioners' courts may decree and adjudge that fences around irrigation farms may be dispensed with, they may make all fair, equal and proper regulations for the keeping up or herding of hogs, cattle and other stock, and for the security and protection of the crops and farms: provided, that if ten or more voters shall make written protest against such decree, then the said court shall proceed by notice and a public election, and ascertain if two-thirds of the voters be in favor of dispensing with the use of fences; otherwise it shall not be so decreed.

THE APPROPRIATION OF WATER.

[Unappropriated Waters Property of Public.]

Art. 3115. The unappropriated waters of the ordinary flow or underflow of every running or flowing river or natural stream, and the storm or rain waters of every river or natural stream, canyon, ravine, depression or watershed

within those portions of the state of Texas in which, by reason of the insufficient rainfall, or by reason of the irregularity of the rainfall, irrigation is beneficial for agricultural purposes, are hereby declared to be the property of the public, and may be acquired by appropriation for the uses and purposes and in the manner as hereinafter provided.

[Storage and Diversion of Storm or Rain Waters.]

Art. 3116. The storm or rain waters, as described in the preceding article, may be held or stored in dams, lakes or reservoirs built and constructed by a person, corporation or association of persons for irrigation, mining, milling, the construction of waterworks for cities and towns, or stock raising, within those portions of Texas described in the foregoing article, and all such waters may be diverted by the person, corporation or association of persons owning or controlling such dam, reservoir or lake for irrigation, mining, milling, the construction of waterworks for cities and towns, and stock raising.

[Diversion of Ordinary Flow of Streams.]

Art. 3117. The ordinary flow or underflow of the running water of every natural river or stream within those portions of Texas described in article 3115 may be diverted from its natural channel for irrigation, mining, milling, the construction of waterworks for cities and towns, or stock raising: provided, that such flow or underflow of water shall not be diverted to the prejudice of the rights of the riparian owner without his consent, except after condemnation thereof in the manner as hereinafter provided.

[Appropriation must be for Certain Purposes.]

Art. 3118. The appropriation of water must be either

for irrigation, mining, milling, the construction of water-works for cities and towns, or stock raising.

[Priority of Appropriation.]

Art. 3119. As between appropriators, the first in time is the first in right.

[Statement of Route of Canal, etc., to be Filed.]

Art. 3120. Every person, corporation or association of persons who have constructed or may hereafter construct any ditch, canal, reservoir, dam or lake, for the purposes named in this chapter, and taking the water from any natural stream, storage reservoir, dam or lake, shall, within ninety days after this chapter goes into effect, or within ninety days after commencement of such construction, file and cause to be recorded in the office of the county clerk of the county where the headgate of such ditch or canal may be situated, or to which said county may be attached for judicial purposes, in a well-bound book, to be kept by said clerk for that purpose, a sworn statement in writing showing approximately the number of acres of land that will be irrigated, the name of such ditch or canal, the point at which the headgate thereof is situated, the size of the ditch or canal, in width and depth, and the carrying capacity thereof in cubic feet per second of time, the name of said stream from which said water is taken, the time when the work was commenced, the name of the owners or owner thereof, together with a map showing the route of such ditch or canal; and when the water is to be taken from a reservoir, dam or lake, the statement above provided for shall show, in addition to the ditch and other things provided for, the locality of the proposed dam, reservoir or lake, giving the names or num-

bers of the surveys upon which it is to be located, its holding capacity in cubic feet of water, the acreage and surface feet of land that will be covered, and the limits of such lake, reservoir or dam, and the area of the watershed from which the storm or rain water will be collected.

[Doctrine of Relation.]

Art. 3121. By compliance with the provisions of the preceding articles, the claimant's right to the use of water relates back to the time when the work of excavation or construction was commenced on said ditch, canal, reservoir, dam or lake: provided, that a failure to file such statement shall in no wise work a forfeiture of such heretofore acquired rights, nor prevent such claimants of such heretofore acquired rights from establishing such rights in the courts.

[Appropriation of Water—Construction of Works.]

Art. 3122. Any person, firm, association of persons or corporation may acquire the right to and appropriate for irrigation purposes the unappropriated waters of the ordinary flow or underflow of every running or flowing river or natural stream, and the storm or rain water of every river or natural stream, canyon, ravine, depression or watershed within those portions of the state referred to in article 3115, by filing a sworn statement in writing, to be recorded as provided in article 3120, declaring his or its intention of appropriating such water. Said statement shall also show [certain prescribed facts relative to the land to be irrigated, the ditch or canal, etc.]: provided, any person, association of persons or corporation who has heretofore had a survey made of the proposed route of his or its ditch shall have a preference right, at any time within ninety days from the

time this chapter shall take effect, to file the statement hereinbefore required for the appropriation of water. Within ninety days next after filing of said statement, the party or corporation claiming the right to appropriate the water shall begin actual construction of the proposed ditch, canal, dam, lake or reservoir, and shall prosecute the work thereon diligently and continuously to completion.

[Completion Defined.]

Art. 3123. "Completion," as used in the preceding section, is hereby defined to be the conducting of the water in the main canal to the place of the intended use.

[Unlawful Diversion of Water.]

Art. 3124. Whenever any person, corporation or association of persons shall become entitled to the use of any water of any river, stream, canyon or ravine, or the storm or rain water hereinbefore described, it shall be unlawful for any person, corporation or association of persons to appropriate or divert any such water in any way, except that the owner whose land abuts on a running stream may use such water therefrom as may be necessary for domestic purposes, and any one whose land may be located within the area of the watershed from which the storm or rain waters are collected may construct on his land such dams, reservoirs or lakes as may be necessary for the storage of water for domestic purposes for such owner of land: provided, that the excess of such water not used or contracted for use by such person, corporation or association of persons for irrigation, mining, milling, waterworks for cities or towns, or stock raising, may be appropriated by any person, corporation or association of persons in the manner hereinbefore provided for the appropriation of water.

IRRIGATION CORPORATIONS.

[Organization, Powers and Duties of Corporations.]

Art. 3125. Corporations may be formed and chartered under the provisions of this chapter, and of the general incorporation laws of the state of Texas, for the purpose of constructing, maintaining and operating canals, ditches, flumes, feeders, laterals, reservoirs, dams, lakes and wells, and of conducting and transferring water to all persons entitled to the same for irrigation, mining, milling, to cities and towns for waterworks and for stock raising, and for the purpose of building storage reservoirs for the collection and storage of water for the purposes before mentioned. All such corporations shall have full power and authority to make contracts for the sale of permanent water rights, and to have the same secured by liens on the land or otherwise, and to lease, rent or otherwise dispose of the water controlled by such corporation for such time as may be agreed upon, and, in addition to the lien on the crops hereinafter provided for, the lease or rental contract may be secured by a lien on the land, or otherwise. All persons who own or hold a possessory right or title to land adjoining or contiguous to any canal, ditch, flume or lateral constructed and maintained under the provisions of this chapter, and who shall have secured a right to the use of water in said canal, ditch, flume, lateral, reservoir, dam or lake, shall be entitled to be supplied from such canal, ditch, flume, lateral, dam or lake with water for irrigation of such land, and for mining, milling and stock raising, in accordance with the terms of his or their contract: provided, that if the person, association or corporation owning or controlling such water, and the person who owns or holds a possessory right or title to land ad-

joining or contiguous to any canal, ditch, flume or lateral constructed and maintained under the provisions of this chapter, fail to agree upon a price for a permanent water right, or for the use or rental of the necessary water to irrigate the land of such person, and for mining, milling and stock raising, such person, firm, association or corporation shall, nevertheless, if such person, firm, association or corporation has or controls any water not contracted to others, furnish the necessary water to such person to irrigate his lands, and for mining, milling and stock raising, at such prices as may be reasonable and just: provided, further, that in case of shortage of water from drought, accident or other cause, the water to be distributed shall be divided among all consumers pro rata, according to the amount he or they may be entitled to, to the end that all shall suffer alike, and preference be given to none. The sale of the permanent water right shall be an easement to the land, and pass with the title thereof, and the owner thereof shall be entitled to the use of the water upon the terms provided in his or their contract with such person or corporation, or, in case no contract is entered into, then at just and reasonable prices. Any instrument of writing providing a permanent water right shall be admitted to record in the same manner as other instruments relating to the conveyance of land.

See, also, as to irrigation corporations, article 642, § 23, and article 704.

[Acquisition of Right of Way, etc.]

Art. 3126. By this article, a right of way not exceeding 100 feet in width is granted to corporations formed under the provisions of this chapter over public lands, and such corporations are also given the right to acquire, by contract

or by condemnation, a right of way over private land, and to condemn the water rights of riparian owners.

[Right of Way Across Public Highways, etc.]

Art. 3128. All said persons, corporations and associations shall have the right to run along or across all roads and highways necessary in the construction of their work, and shall at all such crossings construct and maintain necessary bridges for the accommodation of the public, and shall not impair the usefulness of such road or highway: provided, that if any public road or highway or public bridges should be upon the ground necessary for the dam site, reservoir or lake, it shall be the duty of the commissioners' court to change said road, and to remove such bridges, that the same may not interfere with the construction of the proposed dam, reservoir or lake: provided, further, that the expense of making such change shall be paid by the person, firm or corporation owning such dam site, reservoir or lake.

[Power to Acquire Land, Borrow Money, Issue Bonds, etc.]

Art. 3131. Any corporation organized under the provisions of the general laws of this state, or the provisions of this chapter, for the purpose of irrigation, shall have the power to acquire lands by voluntary donation or purchase, or in payment of stock or water rights, and to hold and dispose of all such land and other property, and to borrow money for the construction, maintenance and operation of its canals, ditches, flumes, feeders, reservoirs, dams, lakes and wells, and may issue bonds and mortgage its corporate and other property and franchises to secure the payment of any debts contracted for the same: provided, no corporation shall issue stock or bonds except for money paid, labor done,

or property actually received, and all fictitious increase of stock or indebtedness shall be void: and provided, further, all lands acquired by said corporation, except such as are used for the construction, maintenance and operation of said canals, ditches, laterals, feeders, reservoirs, dams, lakes and wells shall be alienated within fifteen years from the date of acquiring said lands, or be subject to judicial forfeiture.

[Lien for Water Furnished.]

Art. 3130. This article gives to persons, corporations, or associations of persons who lease or rent the water from their ditches, etc., to the owners of land subject to irrigation therefrom, a preference lien, superior to every other lien, upon the crop or crops raised upon the land irrigated under such lease or contract.

MISCELLANEOUS PROVISIONS.

[Surplus Water to be Returned.]

Art. 3127. All surplus water of a running stream not used or disposed of as provided in the preceding articles shall be conducted back to the stream from which it was taken through a ditch or canal constructed under the provisions of this chapter, or through a natural channel leading back to the stream.

[Trespass by Live Stock—Fences.]

Art. 3129. Unless such person, association of persons or corporation shall fence their said ditch, canal, reservoir, dam or lake, and keep the same securely fenced, then there shall accrue in their favor no cause of action against owners of live stock for any trespass thereon.

[Offenses.]

As to offenses such as injuring irrigating ditches, unlawfully taking water, etc., see Pen. Code, arts. 803a, 803b, and Laws 1899, p. 301.

UTAH.

CONSTITUTIONAL PROVISIONS.

[Existing Water Rights Confirmed.]

Art. 17. All existing rights to the use of any of the waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.

[Taxation of Ditches.]

Art. 13, § 3. * * * Ditches, canals and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose.

STATUTORY PROVISIONS.

[References to Rev. St. 1898.]

THE RIGHT OF APPROPRIATION.

[Water may be Appropriated.]

§ 1261. The rights to the use of any of the unappropriated waters of the state may be acquired by appropriation.

[Appropriation must be for Useful Purpose.]

§ 1262. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his suc-

cessor in interest abandons or ceases to use the water for a period of seven years, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as are other questions of fact.

[Place of Diversion and Use of Water may be Changed.]

§ 1263. This section is substantially the same as Civ. Code Mont. § 1882.

[Use of Natural Stream as Conduit.]

§ 1264. This section is substantially the same as Civ. Code Mont. § 1883.

[Equality of Rights Among Appropriators.]

§ 1265. All persons, corporations or associations that have appropriated any of the waters of the state for agricultural or other useful or beneficial purposes, or that may hereafter appropriate any of the waters of this state for agricultural or other useful or beneficial purposes, from any streams, springs, or lakes within the state, until all of the said waters are or shall have been diverted from the streams, springs, or lakes when at their average flow at low-water mark, shall be deemed to be equal in rights to the said waters, according to their vested rights.

[Secondary Rights.]

§ 1266. A secondary right to the use of water for any useful or beneficial purposes may be appropriated subject to the perfect and complete use of all prior rights, to the extent of and reasonable necessity for such use thereof, in the manner hereinafter prescribed, under any of the following circumstances: 1. Whenever the whole of the waters of any

natural stream, watercourse, lake, spring or other natural source of supply has been taken, diverted and used by prior appropriators for a part or parts of each year only, and other persons shall subsequently appropriate any part, or the whole, of such water during any other part of such year, such persons shall be deemed to have acquired a secondary right. 2. Whenever, at the time of an unusual increase of water exceeding seven years' average flow of such water, at the same season of each year, all the water of such average flow then being used by prior appropriators, and other persons shall appropriate and use such increase of water, such persons shall be deemed to have acquired a secondary right.

Procedure of Appropriation.

[Notice of Appropriation.]

§ 1268. Any person hereafter desiring to appropriate water must post a notice in writing in two conspicuous places,—one copy at the nearest postoffice to the point of intended diversion, one copy at the point of intended diversion, stating therein [the contents prescribed are the same as in Civ. Code Mont. § 1886, except that the water claimed shall be stated in cubic feet per second].

[Record of Notice.]

§ 1269. This section is a copy of the same provision of Civ. Code Mont. § 1886.

[Construction of Works, etc.]

§§ 1270, 1271. Copied from Civ. Code Mont. §§ 1887, 1888, respectively.

[Records of Rights.]

§§ 1272, 1273. Copies from Civ. Code Mont. §§ 1889, 1890, respectively, except that the declaration must be filed within a year instead of six months, as in Montana.

§ 1275. The county recorder must keep a well-bound book, in which he must record the notices and declarations provided for in this title.

Right of Way for Ditches, Etc.

[Right of Way Granted.]

§ 1277. Any person or corporation shall have the right of way across and upon public, private and corporate lands, or other right of way, for the construction, maintenance, repair and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, or other means of securing, storing and conveying water for irrigation, or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property. Such right of way may be acquired in the manner provided by law for the taking of private property for public use.

[Enlargement of Existing Canal.]

§ 1278. When any person or corporation desires to convey water for irrigation, or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person or corporation, or the owner or owners of the lands

through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to enlarge said canal or ditch already constructed by compensating the owner of the canal or ditch to be enlarged for the damage, if any, caused by said enlargement: provided, that said enlargement is to be done at any time from the first day of October to the first day of March, or at any other time that may be agreed upon with the owner of said canal or ditch.

Duties of Appropriators.

[Surplus Water to be Returned Within Twenty-four Hours After Demand.

§ 1267. This section is substantially copied from the proviso of Civ. Code Mont. § 1884, with the exception that the surplus water shall be returned within twenty-four hours instead of five days after demand, and the delinquent shall be liable for damage sustained, instead of a stated sum of $25 per day.

[Duty to Protect Highways by Bridges, etc.]

§ 1279. This section is substantially the same as Civ. Code Mont. § 1895.

[Liability of Co-Owners of Ditches for Repairs, etc.]

§ 1280. When two or more persons, companies or corporations are associated by agreement or otherwise in the use of any canal, ditch, flume or other watercourse, or are using for the irrigation of land or for other purposes any canal, ditch, flume or other watercourse, to the construction of which they or their grantors have contributed, each of them shall be liable to the other for the reasonable expense of

maintaining, repairing, distributing and controlling the same in proportion to the share in the use or ownership of the water to which he is entitled. If any person, company or corporation refuse or neglect to pay his proportion of such expenses after five days' notice in writing, demanding such payment, he shall be liable therefor in an action for contribution.

OFFENSES.

[Unlawfully Taking or Using Water.]

§ 1285. Any person who shall take or use more water than he is entitled to or has been allotted to him by a proper officer shall be deemed guilty of a misdemeanor, and shall be liable in damages to any corporation, company or individual injured by such unlawful taking.

[Obstructing Right of Way.]

§ 1286. Whenever any corporation, company or individual has the right of way for canals or ditches, it shall be unlawful for any person to place or maintain in place any obstruction, by fence or otherwise, along or across such canals or ditches without providing gates sufficient for the passage of the owners or agents of such canals or ditches. Any person violating the provisions of this section shall be guilty of a misdemeanor.

THE ADJUDICATION OF PRIORITIES.

§ 1274. This section is set out in the text [section 107.]

MISCELLANEOUS PROVISIONS.

[References to Rev. St. 1898.]

[Conveyance of Water Rights.]

§ 1281. A right to the use of water appurtenant to land

shall pass to the grantee of such land, and in cases where such right has been exercised in irrigating different parcels of land at different times, such right shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any conveyance thereof; subject, however, in all cases, to payment by the grantee of any such conveyance, of all amounts unpaid on any assessment then due upon any such right: provided, that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance, or may be treated as personal property, and separately conveyed.

[Unit of Measurement—Second-Foot.]

§ 1282. The standard unit of measurement for flowing water shall be the continuous flow of one cubic foot per second of time, and shall be known as the "second-foot."

[Same—Acre Foot.]

§ 1283. The volume of water required to cover one acre to a depth of one foot shall be known as the "acre-foot," and is equivalent to forty-three thousand five hundred and sixty cubic feet.

[Apportionment of Water.]

§ 1284. Water used for beneficial purposes may also be apportioned among the legal users by fractional parts of the whole source of supply, or by fractional parts with a limitation as to periods of time when used.

WASHINGTON.

CONSTITUTIONAL PROVISIONS.

[Use of Water for Irrigation, etc., Public Use.]

Art. 21. The use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use.

STATUTORY ENACTMENTS.

[References to Ballinger's Codes 1897.]

THE RIGHT OF APPROPRIATION.

[Water may be Appropriated.]

§ 4091. The right to the use of water in any lake, pond or flowing spring in this state, or the right to the use of water flowing in any river, stream or ravine of this state, for irrigation, mining or manufacturing purposes, or for supplying cities, towns or villages with water, or for waterworks, may be acquired by appropriation, and, as between appropriations, the first in time is the first in right.

[Same—Use of Water a Public Use.]

§ 4100. Any person, corporation or association of persons is entitled to take from any of the natural streams or lakes in this state water for the purposes of irrigation, not heretofore appropriated, or subject to rights existing at the time of the adoption of the constitution of this state, subject to the conditions and regulations imposed by law: provided,

that the use of water at all times shall be deemed a public use, and subject to condemnation, as may from time to time be provided for by the legislature of this state. [As amended, Laws 1899, p. 261, § 1.]

[Right of Riparian Owners to Use Water.]

§ 4101. All persons who claim, own or hold a possessory right or title to any land, or parcel of land, or mining claim, within the boundary of the state of Washington, when such lands or mining claim, or any part of the same, are on the banks of any natural stream of water, shall be entitled to the use of any water of said stream not otherwise appropriated, for the purposes of mining and irrigation, to the full extent of the soil for agricultural purposes. [As amended, Laws 1899, p. 261, § 2.]

[Right of Nonriparian Owners to Use Water.]

§ 4106. Any person who owns or has the possessory right to lands in the vicinity of any natural stream or lake, not abutting such stream or lake, may take water from such stream or lake if there be any surplus or unappropriated water in such stream or lake.

[When Appropriator's Right Attaches.]

§ 4110. Any person desiring to dig a ditch or canal from any natural stream or lake of water in this state, for the purpose of carrying water to irrigate lands, shall be entitled to take water from said stream or lake not appropriated at the time that the construction of said ditch is begun: provided, that such person shall not keep or store, by virtue of the said ditch, any more water than is used for the purposes of irrigation.

[Appropriation of Waste and Seepage Water.]

§ 4114. This section is substantially the same as Mills' Ann. St. Colo. § 2269.

§ 4115. All persons who shall have enjoyed the use of the water in any natural stream or lake for the irrigation of any land by the natural overflow or seepage of the water of such stream or lake shall, in case of diminution of the water supplied by such stream or lake, from any cause, so as to prevent such irrigation therefrom in as ample a manner as formerly, have the right to construct a ditch for the irrigation of such land, and to take water from such stream or lake therefor; and his right to water through such ditch shall have the same priority as though such ditch had been constructed at the time he occupied and used such land.

Procedure of Appropriation.

[Notice of Appropriation to be Posted.]

§ 4092. Any person, persons, corporation or association desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended storage or diversion, stating therein (1) that such appropriator claims the water there lying, being or flowing to the extent of one cubic foot of water per second of time, or some multiple or some fractional portion thereof; (2) the purpose for which said water is appropriated, and the place or places, as near as may be, of intended use; (3) the means by which it is intended to store or divert the same; (4) a copy of the notice must, within ten days after it is posted, be filed for record in the office of the county auditor of the county in which it is posted.

[Construction of Works.]

§ 4093. If said use is by storage, the appropriator must, within three months after the notice is posted, commence the construction of the works by which it is intended to store the same. If said use is by diversion, the appropriator must, within six months after the notice is posted, commence the excavation or construction of the works by which it is intended to divert the same; it being herein expressly provided that such works must be diligently and continuously prosecuted to completion, unless temporarily interrupted by the elements.

[Right Relates Back—Forfeiture by Non-Compliance.]

§ 4094. By a strict compliance with the above rules, the appropriator's right to the use of the water actually stored or diverted relates back to the time the notice was posted; but a failure to comply therewith deprives the appropriator of the right to the use of the water as against a subsequent appropriator, who faithfully complies with the same.

[Rules Made Applicable to Existing Appropriations.]

§ 4095. Persons who have heretofore appropriated water, and have not constructed works, or have not diverted the water and applied it to some purpose, as herein stated, must, within thirty days after this act takes effect, proceed as in this act provided, or their right ceases.

[Transfer of Right—Notices to be Recorded.]

§ 4096. The right to the use of water acquired by appropriation may be transferred, like other property, by deed. The county auditor of each county in this state must keep a

book in which he must record the notices provided for in this chapter.

[Former Appropriations Recognized.]

§ 4097. Appropriations of water heretofore made for any of the purposes in this chapter provided are hereby recognized, but this chapter shall not be construed to interfere with vested rights.

[Application of Sections 4092-4095 Limited.]

§ 4098. The provisions of sections 4092, 4093, 4094, and 4095 shall only apply to appropriations of water made for irrigation, and shall not apply to appropriations for irrigation made prior to the passage of this act, nor to water rights existing at the date of the passage of this act: provided, that in appropriations for irrigation, begun but not completed prior to the passage of this act, the appropriator shall comply with the provisions of sections 4092, 4093, 4094 and 4095: and further provided, that said sections shall not interfere with the vested rights of any irrigation district now organized.

[Use may be Changed.]

§ 4099. Water appropriated for any of the purposes in this chapter mentioned may be changed to any other purpose herein specified, or to any other beneficial use, and the right to such use shall relate back to the original appropriation.

[Ditch Owner must File Map and Statement.]

§ 4041. Every person, association or corporation hereafter constructing or enlarging any ditch or canal, and taking water directly from any natural stream or lake, and of

the carrying capacity of more than one cubic foot of water per second of time, as so constructed or enlarged, shall, within ninety days after the construction or enlargement, file in the office of the county clerk [of the county] in which the headgate of such ditch may be situated, a map showing the point of location of such headgate, the route of such ditch or canal, and the legal subdivisions of the lands upon which such structures are built or to be built; if on surveyed lands, the names of the owners of such lands, as far as the same are of record in the office of the county clerk of the county in which they are situated, such courses, distances and corners, by reference to legal subdivisions, if on surveyed lands, or to natural objects, if on unsurveyed lands, as will clearly designate the location of such structures. Upon or attached to such map shall be a statement showing (1) the point of location of the headgate above mentioned; (2) the depth, width and grade of such ditch or canal; (3) the carrying capacity of such ditch or canal in cubic feet per second of time; (4) the time of commencement of work on such structures, which time may be dated from the commencement of the surveys therefor. In case of construction or enlargement, such statement shall also show the matters required in items second, third and fourth above, as to the enlargement, and state the increased capacity arising from such enlargement. If such statement be filed within the time above limited, priority of right of way and water accordingly shall date from the day named as the day of commencing work; otherwise, only from the date of the filing of the same: provided, that nothing herein contained shall be taken to dispense with the necessity of due diligence in the prosecution of such structures on the part of the projectors of the same. Such statement shall be signed by the person, association or

corporation on whose behalf it is made, and the truth of the matters shown in such map, and statement, shall be sworn to by some person in whose personal knowledge the truth of the same shall lie.

§ 4142. This chapter shall apply to and affect only ditches or canals used for carrying water for the purpose of irrigation, and for no other purpose whatever: provided, that all rights shall be forfeited under the provisions of this chapter unless due diligence is used in such construction or enlargement.

Right of Way for Ditches, Etc.

The right of way for ditches, etc., is granted, and the right of condemnation regulated, by sections 4102-4104, and 4138, 4139, copied respectively from Mills' Ann. St. Colo. §§ 2257, 2258, 2260-2262. Sections 4102-4104 seem to be superseded by Laws 1899, p. 261, §§ 3-5. Besides these provisions, there are other sections as follows:

§ 4133. All persons, associations and corporations entitled to the use of water under the provisions of this chapter, in cases where the right of way over intervening lands is necessary to the use of such water, may condemn the right of way for any such ditch or ditches as hereinafter provided.

See, also, sections 4107, 4117 and 4136, granting a right of way in special cases. As to condemnation proceedings, see sections 3134, 4135. [Laws 1899, p. 261, §§ 6, 7.]

The right to extend the head of a ditch up stream is granted by section 4140, copied from Mills' Ann. St. Colo. § 2264.

[Use of Natural Stream as Channel.]

§ 4112. This section authorizes persons having a right to water to take the same along any natural stream or lake,

but not so as to raise the waters thereof above ordinary high-water mark, due allowance being made for evaporation and seepage, the amount of seepage to be determined by the commissioners of irrigation, or, if there be none, by the county commissioners.

[Use of Pumps, etc.]

§ 4113. This section authorizes the use of wheels, steam pumps or other machines to raise water to the required level, and the condemnation of a right of way therefor.

CONDEMNATION OF WATER RIGHTS.

§§ 4143-4153. Any person, association or corporation desiring to condemn the riparian rights of persons in any natural stream or lake in this state may do so. The statute prescribes the procedure for condemnation in such case, which is substantially the same as for a right of way.

§ 4156. The right herein given to condemn the use of water shall not extend any further than to the riparian rights of persons to the natural flow of water through lands upon or abutting said streams or lakes, as the same exists at common law, and is not intended in any manner to allow water to be taken from any person that is used by said person himself for irrigation, or that is needed for that purpose by any such person.

PUBLIC CONTROL OF IRRIGATION.

Each county of the state is constituted an irrigation district, and for each district a water commissioner may be appointed by the county commissioners. The duties of the water commissioner are substantially the same as those of such officers in Colorado, the statutes of which state on the

subject having been adopted with little change. [See the text, sections 121, 123.] These provisions constitute sections 4125-4127, 4129-4132.

REGULATION OF USE OF WATER BY COMMISSIONERS APPOINTED BY SUPERIOR COURT.

[Apportionment of Water in Time of Scarcity.]

§ 4108. In case, at any time, the supply of water in any natural stream or lake is below the usual supply of water in said stream or lake, upon application of any person interested the superior court of any county through which said stream or lake may flow shall appoint three commissioners whose duty it shall be to immediately go upon said stream or lake, and apportion the water running in said stream or lake to the different persons entitled to use the said stream or lake, as may seem to them equitable and proper, having due regard for the vested rights of the persons so entitled to use water from said stream or lake: provided, that said commissioners shall apportion to all persons upon such stream or lake for domestic purposes before any water is allowed to be taken from said stream or lake for the purposes of irrigation: and provided that, in case of unusual drought, said commissioners shall endeavor to apportion the water to the persons entitled to use the water from said stream or lake, so that the orchards and perennial plants upon farms of such person so entitled to use such water shall be supplied with sufficient water to keep them alive.

[Rights to be Based Upon Usual Flow of Water.]

§ 4109. The vested rights to water, whenever called into question in any court, and whenever the same are required to be determined by any commissioners or commissioner, under

the provision of the laws of this state, shall be based and determined upon the usual volume of water annually flowing in the natural streams and lakes of the state; and in the event of any of the said streams or lakes being unusually low, the rights of all persons to water out of the said stream or lake shall be reduced in accordance with the reduction of the water in said stream or lake below the usual stage of water in said stream or lake at the time of year when the particular matter is brought before said commissioners, commissioner or court.

[Regulation of Flow of Water in Ditch.]

§ 4111. Upon the application of any person interested, the superior court of any county in which any ditch, or the part of any ditch, constructed in accordance with the preceding section [section 4110] is situated, may appoint three commissioners to inquire and determine whether or not more water is diverted by means of said ditch than is used, or than is to be properly used, during any season, for the purposes of irrigation, and the descision of said commissioners shall be final, and they shall have power to order and require the person having charge of said ditch to turn off such part of the water in said ditch as they may deem to be unnecessary for the use of the land being cultivated and to be cultivated during such season by water taken from said ditch; and any failure upon the part of any person controlling said ditch to comply with the order of said commissioners aforesaid shall be punished as a contempt of the superior court of the county appointing said commissioners; and all persons constructing ditches and taking water from the natural streams or lakes of this state, as provided for herein, shall take the same subject to all the conditions, restrictions,

and regulations of this section, and of the laws hereafter made and provided.

[Allotment of Water on Alternate Days.]

§ 4105. This section is copied from Mills' Ann. St. Colo. § 2259.

[Water to be Prorated in Case of Deficiency.]

§ 4116. This section is substantially the same as Mills' Ann. St. Colo. § 2267.

IRRIGATION COMPANIES.

[Corporations may Construct Ditches, etc.]

§ 4154. Any corporation duly organized under the laws of this state for the purpose of constructing ditches or canals to carry water for irrigating purposes, or any person or persons, or association or firm, may construct irrigating canals, ditches or flume ways for the purposes of carrying water from any natural stream, reservoir, or any lake within this state, and may condemn the right of way therefor, as hereinbefore provided for by sections 4133 to 4142, for the purposes of furnishing water to persons upon the line of said ditch, or its lateral branches, to irrigate the lands of any person or persons, whether the same be on any natural stream or lake, or whether or not said corporation, association, person or firm owns any land upon the line of the said ditch, or its laterals.

[Ditch Company a Public Carrier.]

§ 4155. Such corporation, person, association or firm shall be deemed to be a public carrier, and shall at all times

be subject to the regulations prescribed for said ditch by the legislature from time to time.

Duties and Liabilities of Ditch Owners.

The provisions under this head are substantial copies of the Colorado statutes, and are as follows, the corresponding sections of Mills' Statutes being enclosed in []: As to ditch embankments and tail ditches, section 4119 [2274]; as to bridging ditches, section 4120 [2276, 2277, 2287]; as to headgates, section 4122 [2285]; as to running excess of water section 4121 [2283, 2284]. Owners of ditches are made liable for damages resulting through neglect or refusal to comply with these provisions. Section 4123.

[Duty of Ditch Owner to Keep Ditches, etc., in Repair.]

§ 4137. The owners or constructors of ditches, canals, works or other aqueducts, and their successors in interest, using and employing the same to convey the waters of any stream, spring or lake, whether the said ditches, canals, works or other aqueducts be upon the lands owned or claimed by them, or upon other lands, must carefully keep and maintain the same, and the embankments, flumes or other conduits by which such waters are or may be conducted, in good repair and condition, so as not to damage or in any way injure the property or premises of others.

Adjudication of Priorities.

The provisions of this subject [sections 4158-4165] are taken from the Colorado statutes. See the text, section 107.

MEASUREMENT OF WATER.

§ 4090. The unit of measure for water for irrigation, mining, milling and mechanical purposes in this state shall be a cubic foot of water per second of time.

OFFENSES.

[Interference With Headgate, etc.]

§ 4128. This section is copied from Mills' Ann. St. Colo. § 2385.

[Injury to Ditches.]

§ 4157. Copied from Mills' Ann. St. Colo. §§ 2283,

[Running Excess of Water Through Ditch.]

§ 4121. Copied from Mills' Ann. Colo. §§ 2283, 2284.

IRRIGATION DISTRICTS.

The provisions relating to irrigation districts [sections 4166-4229] are modelled on the California acts.

WYOMING.

CONSTITUTIONAL PROVISIONS.

[Control of Water in State.]

Art. 2, § 31. Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved.

[Eminent Domain.]

Art. 2, § 32. Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation.

Art. 2, § 33. Private property shall not be taken or damaged for public or private use without just compensation.

[Water Property of State.]

Art. 8, § 1. The water of all natural streams, springs, lakes or other collections of still water within the boundaries of the state are hereby declared to be the property of the state.

[**Board of Control.**]

Art. 8, § 2. There shall be constituted a board of control, to be composed of the state engineer and superintendents of the water divisions, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state, and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state.

[**Priority of Appropriation.**]

Art. 8, § 3. Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.

[**Water Divisions.**]

Art. 8, § 4. The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of superintendents thereof.

[**State Engineer.**]

Art. 8, § 5. There shall be a state engineer, who shall be appointed by the governor of the state and confirmed by the senate. He shall hold his office for the term of six (6) years, or until his successor shall have been appointed, and shall have qualified. He shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position.

STATUTORY PROVISIONS.

[References to Rev. St. 1899.]

Wyoming has a large body of statute law on the subject of irrigation. Much of this has already been set out in substance in the body of this work, and will therefore not be repeated here. Thus, for provisions as to the adjudication of priorities, see the text, section 106; as to public control of irrigation, see section 122.

APPROPRIATION OF WATER.

[Right of Appropriation Limited.]

§ 895. The priority of right to the use of water shall be limited and restricted to so much thereof as may be necessarily used and appropriated for irrigation, or other beneficial purposes, as aforesaid, irrespective of the carrying capacity of the ditch, and all the balance of the water not so appropriated shall be allowed to run in the natural stream from which such ditch draws its supply of water, and shall not be considered as having been appropriated thereby; and in case the owner or owners of any such ditch, canal or reservoir shall fail to use the water therefrom for irrigation or other beneficial purposes, or shall refuse to furnish any surplus water to the owner or owners of lands lying under such ditch, as hereinafter provided, during any two successive years, they shall be considered as having abandoned the same, and shall forfeit all water rights, easements and privileges appurtenant thereto, and the waters formerly appropriated by them may be again appropriated for irrigation and other beneficial purposes, the same as if such ditch, canal or reservoir had never been constructed; neither shall the

owner or owners of any such ditch, canal or reservoir have any right to receive from others any royalty for the use of the water carried thereby, but every such owner or owners having a surplus supply of water, and furnishing the same to others from any ditch, canal or reservoir, as hereinafter provided, shall be considered common carriers, and shall be subject to the same laws that govern common carriers.

[Sale of Surplus Water—County Commissioners to Fix Rates.]

§ 896. The owner or owners of any ditch which carries a greater quantity of water than the owner or owners thereof necessarily use for irrigation and other beneficial purposes in connection with their own lands shall, when application is made to them for that purpose, furnish such surplus water at reasonable rates to the owners of lands lying under any such ditch for the purpose of reclaiming such lands, and rendering the same productive; and in case of refusal so to do, the owner or owners of any such ditch may be compelled by injunction suit to furnish such water on such terms as to the court may seem meet and proper: provided, that the board of county commissioners in their respective counties shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations.

RIGHT OF WAY FOR DITCHES, ETC.

[Right of Way Granted.]

§ 897. This section is the same as Mills' Ann. St. Colo. § 2257, concluding, however, with the proviso that, in the construction, keeping up and using any ditch through the

lands of another person, the person or persons constructing or using said ditch, or whose duty it shall be to keep the same in repair, shall be liable to the person owning or claiming such land for all damages accruing to such person by reason of said construction, keeping up and using such ditch.

[Right Limited.]

§ 898. Same as Mills' Ann. St. Colo. § 2258.

[Condemnation of Right of Way.]

Upon the refusal of owners of tracts of land or lands through which said ditch is proposed to run to allow of its passage through their property, the persons desiring to open such ditch may present to the county commissioners of the county in which said lands are located a petition signed by the person or persons, describing, with convenient accuracy, the lands so desired to be taken as aforesaid, setting forth the name or names of the owner or other person interested, and praying the appointment of three appraisers to ascertain the compensation to be made to such owner or persons interested. Upon the receipt of said petition, the said county commissioners shall give notice, at least thirty days prior to the appointment of the said appraisers, by public notice in a newspaper, when published in the county, or by posting three or more notices in three different places in said county, stating that such appraisers will be appointed on the ——— day of ———.

[Proceding of Appraisers—Payment of Assessment.]

§ 900. This section prescribes the duties of the appraisers, and provides that upon the payment of the compensation assessed the person desiring to construct the ditch or flume shall have the right of way therefor.

[Arbitration of Claim for Right of Way.]

§§ 904-907. These sections provide for the submission of a claim for a right of way by the parties interested to a board of arbitration, consisting of one member chosen by each of the parties, and a third by the two thus chosen. Any two may render a decision. An appeal is allowed within ten days to the board of county commissioners, and the parties then proceed as though the matter had been brought before the commissioners in the first instance. If no appeal is taken, the finding of the arbitrators is final and binding, provided each party shall have complied with the finding, or tendered such compliance.

Duties and Liabilities of Ditch Owners.

[Ditches to be Kept in Repair.]

§ 901. The owner or owners of any ditch for irrigation or other purposes shall carefully maintain the embankments thereof, so that the waters of such ditch may not flood or damage the premises of others.

[Duty to Maintain Headgate.]

The appropriator of any of the public waters of the state shall maintain, to the satisfaction of the division superintendent of the district in which the appropriation is made, a substantial headgate at the point where the water is diverted, which shall be of such construction that it can be locked and kept closed by the water commissioner; and such appropriator shall construct and maintain, when required by the division superintendent, a flume or measuring device, as near the head of such ditch as is practicable, for the purpose of assisting the water commissioner in determining the

amount of water that may be diverted into such ditch from the stream. If any owner or appropriator of public waters that have been adjudicated upon should refuse or neglect to put in such headgate or measuring device, after thirty days' notice to do so by the division superintendent, the said superintendent may notify the county commissioners of the county where such headgate, flume or measuring device is situated, and it shall be the duty of said county commissioners, when so notified by said division superintendent, to put in such headgate, flume or measuring device at the expense of the county where the expense is incurred, and present a bill of costs to the owner or owners of the ditch, and if such owner or owners shall refuse or neglect for three days after the presentation of such bill of costs to pay the same, the said costs shall be made a charge upon the said ditch, and shall be collected as delinquent taxes, and be subject to the same conditions and penalties as other delinquent taxes, and, until the full and complete payment of such bill of costs, it shall be the duty of the water commissioner of the district in which such ditch is situated to close and keep closed the headgate of such ditch, and to take such needful steps as will prevent any water from being diverted therein from the source of supply.

[**Duty to Bridge Ditches.**]

§ 1959. By this section it is made the duty of any person, company, corporation or association of persons constructing, operating or maintaining any ditch, canal or watercourse, not being a natural stream, for irrigation or other purposes, to construct, maintain and keep in repair a good, substantial bridge, not less than fourteen feet wide, over such ditch, canal or water-

course where it crosses any public highway or traveled road. Violation of this section is a misdemeanor, punishable by a fine of not exceeding $100 for each day such ditch, etc., shall be unbridged, insufficiently bridged, or permitted to remain out of repair.

[Construction of Bridge by County Commissioners.]

§ 903. This section provides that when a ditch or watercourse constructed across any public traveled road is not bridged within three days, the county commissioners shall construct a bridge and collect the cost thereof from the owner of the ditch or watercourse.

[Duty to Protect Fish.]

§ 970. This section provides that it shall be the duty of every person, corporation or company, who shall construct, maintain or operate any irrigating ditch or canal, to construct and maintain, at the point and place where the water is diverted from its natural channel, some fit and proper obstruction whereby all fish will be prevented from entering said ditch or canal. Violation of this provision is made a misdemeanor punishable by fine of not more than $100, or by imprisonment in the county jail not less than 10 nor more than 60 days, or by both such fine and imprisonment.

[Liability of Reservoir Owner.]

§ 974. Copied from Mills' Ann. Colo. § 2272.

Ditches Held in Co-Ownership.

[District Court May Appoint Person to Distribute Water.]

§§ 908-914. It is provided that whenever two or more

joint owners in an irrigating ditch are unable to agree as to the division or distribution of water received through such ditch, it shall be lawful for them, or any of them, to apply to the district court of the district in which such ditch is located, by a verified petition setting forth such fact, asking for the appointment of some suitable person to take charge of the ditch for the purpose of making a just distribution of the water therefrom to the persons entitled thereto. The proceedings for securing such appointment are prescribed. Upon it being made to appear to the court, judge or commissioner hearing the application that the protection of the rights of the parties requires it, he shall appoint some suitable disinterested person to distribute the water, who shall have exclusive control of the ditch for this purpose until removed by the order of the proper court, judge or commissioner. Provision is made for the payment of the compensation and expenses of the person so appointed.

[Liability of Co-Owners for Maintenance of Ditch.]

§ 915. This section provides that upon the failure or neglect of one or more joint owners of an irrigation ditch to do his or their proportionate share of the work necessary for the proper maintenance and operation of such ditch, the other owner or owners, being a majority of the owners, desiring the performance of such work, may, after giving ten days' written notice to the delinquent or delinquents, perform such work, and recover therefor from the others their proportionate share of the expense in any competent court having jurisdiction of the subject-matter.

[Lien for Work Performed on Ditch.]

§ 916. Upon the failure of any person liable under the

preceding section to pay his proportionate share of the expense, as stated, within thirty days after receiving a statement of the same, the person or persons so performing the labor may secure payment by filing a verified statement of the claim with the county clerk, whereupon such claim shall constitute a lien against the interest of the delinquent, which lien may be enforced in the same manner as mechanics' (builders' liens.

IRRIGATION COMPANIES.

[Organization of Ditch Companies.]

§ 3066. This section is substantially the same as 3 Mills' Ann. St. Colo. § 567, omitting the provisions as to reservoirs and pipe lines.

[Right of Way.]

§ 3067. Substantially the same as 3 Mills' Ann. St. Colo. § 568, with the omission noted in preceding section.

[Duty to Furnish Water to Consumers.]

§ 3068. This section is copied substantially from Mills' Ann. St. Colo. § 570.

[Ditch to be Kept in Good Condition.]

§ 3069. This section is copied from Mills' Ann. St. Colo. § 571, but contains a proviso that, where the company's ditch has priority of right by location, the owners of the mining claim or other property protected by this section shall be compelled to protect themselves from damages from the ditch, and shall be liable to the ditch owners for any damages resulting to the ditch by reason of works or operations performed on such claim or property.

[Ditch Company May Issue Bonds.]

§ 3070. This section authorizes ditch companies to issue bonds.

[Application of Preceding Sections.]

§ 3071. The five preceding sections shall apply to all ditch companies already formed and incorporated under the laws of Wyoming.

[Capital Stock of Ditch Companies Assessable.]

§ 976. By this section, the capital stock of ditch companies whose stock or ditch property is owned wholly by persons or corporations owning lands under the line of the company's ditches, and using water from such ditches by reason of being stockholders, is made assessable.

OFFENSES.

[Interference with Headgate.]

§ 971. Any person who shall willfully open, close, change or interfere with any headgate or water box without authority shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined a sum not exceeding one hundred dollars, or be imprisoned in the county jail for a term not to exceed six months, or both.

[Water Commissioner May Arrest.]

§ 972. By this section, water commissioners are empowered to arrest persons offending under the preceding section.

[Injuring Ditches, etc.]

§ 973. This section is copied from Mills' Ann. St. Colo.

§ 2393, except that the penalty prescribed is a fine not exceeding $100, or imprisonment not exceeding six month, or both.

MISCELLANEOUS PROVISIONS.

[References to Rev. St. 1899.]

[Unit of Measurement.]

§ 968. A cubic foot of water per second of time shall be the legal standard for the measurement of water in this state, both for the purpose of determining the flow of water in natural streams, and for the purpose of distributing water therefrom.

[Dams—Plans to be Submitted.]

§ 931. Duplicate plans of any dam across the channel of a running stream, above five feet in height, or of any other dam intended to retain water above ten feet in height, shall be submitted to the state engineer for his approval, and it shall be unlawful to construct such dam until the said plans have been approved.

[Authority of State Engineer to Inspect Works.]

§ 932. This section authorizes the state engineer to examine and inspect during construction, dams or canals, etc., carrying over fifty cubic feet of water per second, and to order such additions or alterations as he may deem necessary.

[Inspection at Instance of Landowner.]

§ 933. This section provides for the inspection of irrigation works, at the instance of persons residing on or owning land in the neighborhood thereof.

[Vested Rights Preserved.]

§§ 902, 977. By these sections it is provided that the statutes shall not be so construed as to impair vested rights.

TABLE OF CASES.

[REFERENCES ARE TO SECTIONS.]

A.

Ada County Farmers' Irr. Co. v. Farmers' Canal Co. 66, 72, 79, 85, 87
Albuquerque Land & Irr. Co. v. Gutierrez 126, 128
Alfalfa Irr. Dist. v. Collins 135
Alhambra Addition Water Co. v. Mayberry 17
Alhambra Addition Water Co. v. Richardson 88, 95, 115
Aliso Water Co. v. Baker 4, 127
Alta Land & Water Co. v. Hancock 3, 13, 35, 73, 79, 88, 90
American Co. v. Bradford 115
Anaheim Water Co. v. Semi-Tropic Water Co. 11, 79, 90
Anthony v. Lapham 11, 16, 19
Arave v. Idaho Canal Co. 68
Armstrong v. Larimer County Ditch Co. 53, 72
Arnett v. Linhart 73, 78, 79
Arnold v. Foot 16, 17
Arnold v. Passavant 48, 85
Atchison v. Peterson 23
Atlantic Trust Co. v. Woodbridge Canal & Irr. Co. 4, 74, 130
Austin v. Chandler 10
Authors v. Bryant 91, 97

B.

Baker v. Brown 3, 88, 90, 91
Ball v. Kehl 90, 92, 115
Baltes v. Farmers' Irr. Dist. 139
Barham v. Hostetter 111
Barkley v. Tieleke 86
Barnes v. Sabron 27, 28, 32, 48, 52, 54, 55, 56, 61
Barrett v. Metcalf 3, 24, 33
Barrows v. Fox 19, 42, 54, 95, 97, 109, 114
Basey v. Gallagher 26, 27, 52

Bates v. Van Pelt 69
Bathgate v. Irvine 11, 12, 13, 14, 90, 92, 94
Baxter v. Gilbert 60
Bean v. Stoneman 68, 81, 115
Bear Lake & River Waterworks & Irr. Co. v. Ogden City.... 72, 76
Beaver Brook Reservoir & Canal Co. v. St. Vrain Reservoir & Fish Co. 26, 28, 47, 85, 87, 118
Beck v. Pasadena Lake Vineyard Land & Water Co. 125
Becker v. Marble Creek Irr. Co. 54, 59
Benton v. Johncox 25, 26, 30
Bigelow v. Draper 10, 120
Blaisdell v. Stephens 111
Blanchard v. Baker 11, 16, 19, 113
Bliss v. Grayson 10, 68
Bliss v. Johnson 114
Bloom v. West 52, 73
Board County Com'rs Park Co. v. Locke 121
Board County Com'rs Pueblo Co. v. Gould 121
Board of Directors Middle Kittitas Irr. Dist. v. Peterson 137
Board of Directors Modesto Irr. Dist. v. Tregea.... 136, 139
Boehmer v. Big Rock Irr. Dist. 14, 116, 137, 138
Boulder & Weld County Ditch Co. v. Lower Boulder Ditch Co. 101, 103
Bowman v. Bowman 54, 55, 81, 90, 111
Boyce v. Cupper 90
Boynton v. Longley 68
Bree v. Wheeler 91
Bright v. Farmers' High Line Canal & Reservoir Co. 131
Brighton & N. P. Irr. Co. v. Little.... 132
Broadmoor Dairy & Live Stock Co. v. Brookside Water & Imp. Co. 53, 97, 99, 100, 101
Broder v. Water Co. 26, 28, 66
Brown v. Ashley 113, 114
Brown v. Farmers' High Line Canal & Reservoir Co. 131
Brown v. Mullin 52, 58
Bruening v. Dorr 60
Bugh v. Rominger 103
Burnham v. Freeman 52, 80
Burrows v. Burrows 39
Butte Canal & Ditch Co. v. Vaughan 43
Bybee v. Oregon C. R. Co. 66

C.

Cache La Poudre Irr. Co. v. Larimer & Weld Reservoir Co. 48, 79, 85, 134

Cache La Poudre Reservoir Co. v. Water Supply & Storage Co.
47, 59, 61, 118
Canal Certificates, In re....121
Carman v. Staudaker 79
Carron v. Wood 55, 109
Carson v. Gentner 25, 26, 28, 29
Caruthers v. Pemberton 55
Case v. Hoffman 11, 32
Cash v. Thornton 72, 110
Catlin Land & Canal Co. v. Best 68, 69
Cave v. Crafts 26, 78, 91
Center Creek Water & Irr. Co. v. Lindsay 90
Central Irr. Dist., In re....135, 136, 139
Central Irr. Dist. v. De Lappe 135, 136, 137
Chamberlain v. Amter 78
Charnock v. Higuerra 1, 11, 14, 18, 42
Charnock v. Rose 123
Chauvet v. Hill 25
Chicosa Irr. Ditch Co. v. El Moro Ditch Co. 44, 64
Chidester v. Consolidated Ditch Co. 68, 69
Child v. Whitman 72, 78, 80
Childs v. Lowenbruck 103
Church v. Stillwell 54, 59, 90, 99, 118
Churchill v. Baumann 109, 114, 115
Churchill v. Lauer 111
City of Denver v. Mullen 26, 30, 68, 71
City of San Diego v. Linda Vista Irr. Dist. 139
City of Santa Cruz v. Enright 25, 92
City of Springville v. Fullmer 123
Clark v. Cambridge & A. Irr. & Imp. Co.... 24
Clear Creek Land & Ditch Co. v. Kilkenny....64, 68
Clifford v. Larrien 74, 79, 110
Clough v. Wing 10, 27, 54
Clyne v. Benicia Water Co.... 78
Coffin v. Left Hand Ditch Co. 22, 25, 50, 52, 121
Coffman v. Robbins 9, 11, 81
Colburn v. Richards 16
Cole v. Logan 37, 41, 46, 47, 48, 51, 54, 82
Colorado Consolidated Land & Water Co. v. Morris 69
Colorado Land & Water Co. v. Rocky Ford Canal, etc., Co. 47, 51, 77
Colorado Milling & Elevator Co. v. Larimer & Weld Irr. Co.
53, 54, 59, 118

Combs v. Agricultural Ditch Co. ..45, 47, 96, 124, 126, 129, 131, 134
Combs v. Slayton 81
Conant v. Jones 48
Conkling v. Pacific Imp. Co. 48, 110, 113, 114
Consolidated Canal Co. v. Peters 132
Consolidated Home Supply Ditch & Reservoir Co. v. Hamlin 68
Cook v. Hull 16
Coonradt v. Hill 78, 88
Cooper v. Miller 139
Coventon v. Seufert 62, 78
Cox v. Clough 88, 90, 91
Crall v. Poso Irr. Dist.................................135, 137, 139
Crane v. Winsor 117
Crawford v. Minnesota & M. Land & Imp. Co. 90
Creek v. Bozeman Water Works Co............................ 58
Creighton v. Kaweah Canal & Irr. Co. 60
Crippen v. Burroughs 103
Crisman v. Heiderer 67
Crook v. Hewitt 110
Crooker v. Benton 78
Cross v. Kitts 32, 33
Cruse v. McCauley 28, 29, 30, 41, 113
Cullen v. Glendora Water Co. 136, 139
Cummings v. Hyatt 128
Cummings v. Peters 62
Curtis v. La Grande Hydraulic Water Co. 81, 94
Cushman v. Highland Ditch Co. 117

D.

Daley v. Anderson 106
Daley v. Cox 123
Dalton v. Rentaria 94
Daum v. Conley 103
Davis v. Gale.................................... 45, 50, 82, 85, 88
Davis v. Getchell 11
De Baca v. Pueblo of Santo Domingo 123
De Necochea v. Curtis 28, 32, 39
Denver City Irr. & Water Co. v. Middaugh 65
Denver, T. & Ft. W. R. Co. v. Dotson.................28, 32, 40, 74
Deseret Irr. Co. v. McIntyre 109
Directors of Fallbrook Irr. Dist. v. Abila 136
Dorr v. Hammond 82, 102

Dougherty v. Haggin 55, 97, 115
Downing v. Agricultural Ditch Co. 115
Downing v. More 62, 63, 64
Doyle v. San Diego Land & Town Co. 79
Drake v. Earhart 10, 23, 27, 28, 45, 52, 57, 77, 97
Dunniway v. Lawson 52
Durkee v. Cota 81
Dyke v. Caldwell 37, 41

E.

Earl of Norbury v. Kitchin 14, 42
Earl of Sandwich v. Great Northern R. Co. 11
Edgar v. Stevenson 57, 58
Egan v. Estrada 90
Ellinghouse v. Taylor 4, 62
Elliot v. Fitchburg R. Co. 9, 11, 16, 17, 113
Elliot v. Whitmore 95
Ellis v. Pomeroy Imp. Co. 25, 30
Ellis v. Tone 11, 43, 109
Ely v. Ferguson 26, 32, 35, 73
Embrey v. Owen 11, 16, 113
Emerson v. Eldorado Ditch Co. 62
Emigrant Ditch Co. v. Webber 128
Empire Land & Canal Co. v. Board Com'rs Rio Grande County .. 76
Evans v. Merriweather 3
Evans v. Ross 109, 111, 114

F.

Fairbanks v. Rollins 81
Fallbrook Irr. Dist. v. Abila 139
Fallbrook Irr. Dist. v. Bradley 4, 135, 137, 139
Farley v. Spring Valley Min. & Irr. Co. 28, 30
Farm Inv. Co. v. Carpenter 10, 106, 120, 122
Farmer v. Ukiah Water Co. 78
Farmers' High Line Canal & Reservoir Co. v. Moon 66
Farmers' High Line Canal & Reservoir Co. v. Southworth .. 47, 52, 75, 99, 115, 120, 121, 126, 131, 132
Farmers' High Line Canal & Reservoir Co. v. Westlake 71
Farmers' Independent Ditch Co. v. Agricultural Ditch Co. 47, 60, 101, 115, 121, 124, 130
Farmers' Independent Ditch Co. v. Maxwell 121
Farrell v. Richards 11

Faulkner v. Rondoni 28, 60, 88, 90
Faull v. Cooke 30
Feliz v. City of Los Angeles 94
Ferrea v. Chabot 81
Ferrea v. Knipe 9, 11
Fisher v. Bountiful City 72, 78, 123
Fitzell v. Leaky 73, 75
Fleming v. Davis 7
Floyd v. Boulder Flume & Mercantile Co. 38
Foreman v. Boyle 111
Frank v. Hicks 72, 73, 77, 78
Fresno Canal & Irr. Co. v. Dunbar 132, 133
Fresno Canal & Irr. Co. v. Rowell 132
Fresno v. Fresno Canal & Irr. Co. 68
Frey v. Lowden 95, 96
Ft. Morgan Land & Canal Co. v. South Platte Ditch Co. 36, 47, 72, 77
Fudickar v. East Riverside Irr. Dist. 72
Fulton Irr. Ditch Co. v. Twombly 131

G.

Garrett v. Bishop 81
Garwood v. New York Cent. R. Co. 3, 11
Garwood v. New York Cent. & H. R. R. Co. 11
Gassert v. Noyes 50, 85
Geddis v. Parrish 25, 28, 32, 80
Geertson v. Barrack 52
Gelwicks v. Todd 73, 78, 79
Gibson v. Puchta 68
Giddings v. 76 Land & Water Co. 132
Gillett v. Johnson 11, 16, 17, 32
Golden Canal Co. v. Bright 124, 129, 131, 133
Gould v. Eaton 9, 13, 19, 79, 113
Gould v. Stafford 16, 17, 19, 79, 109, 112, 115
Greeley Irr. Co. v. House 68, 69
Green v. Carotta 21, 109
Greenslade v. Halliday 11
Greer v. Cache Val. Canal Co. 74
Greer v. Heiser 54, 84, 104

H.

Hague v. Nephi Irr. Co. 46, 47, 54
Hall v. Eagle Rock & Willow Creek Water Co. 124

Hall v. Lincoln 82, 85, 87
Hall v. Swift 11
Hammond v. Rose 28, 50, 52, 57
Handy Ditch Co. v. South Side Ditch Co..............100, 101, 104
Hanson v. McCue 33
Hargrave v. Cook 9, 12, 25, 46, 67, 90
Harris v. Harrison 11, 18, 116
Harris v. Tarbet 135, 138
Hayden v. Long 9, 11, 13
Hayes v. Fine 72, 80
Healy v. Woodruff 57, 59
Heilbron v. Fowler Switch Canal Co.................. 79, 110, 113
Heilbron v. Kings River & F. Canal Co. 110, 112
Heilbron v. Last Chance Water Ditch Co...................... 110
Heilbron v. 76 Land & Water Co 12, 16, 18, 56, 113
Heintzen v. Binninger 90, 115
Herriman Irr. Co. v. Butterfield Min. & Mill Co. 109
Herring v. Modesto Irr. Dist. 137, 139
Hesperia Land & Water Co. v. Rogers 91
Hewitt v. San Jacinto & P. V. Irr. Dist. 132, 138
Hewitt v. Story 82
Hill v. Lenormand 10, 23, 115
Hillman v. Hardwick 52, 54
Hillman v. Newington 111, 112
Hindman v. Rizor 47, 48, 54, 80, 82, 85, 86, 87
Hines v. Johnson 52
Hoffman v. Stone 43
Holman v. Pleasant Grove City 97, 123
Houston v. Leach.................................... 33
Howell v. Johnson 26
Hughson v. Crane 139
Hulsman v. Todd 111, 116
Huning v. Porter 96
Huntley, In re 97
Huston v. Bybee 81, 90

I.

In re Canal Certificates 121
In re Central Irr. Dist. 135, 136, 139
In re Huntley 97
In re Madera Irr. Dist. 135, 136, 137, 139
In re Senate Resolution, ... 118, 121
Irwin v. Strait 51

J.

Jacob v. Lorenz 74, 111
Jarvis v. State Bank of Ft. Morgan 66, 74
Jatunn v. O'Brien 44
Jatunn v. Smith 93
Jenkins v. Hooper Irr. Co. 69
Jennison v. Kirk 23, 26, 66
Jensen v. Hunter 81, 91
Jerrett v. Mahan 114, 115
Johnson v. Bielenberg 97
Johnson v. Superior Court 114
Jones v. Adams 11, 26, 52, 56
Joseph v. Ager 67
Judkins v. Elliott 28
Junction Creek & N. D. D. & I. Ditch Co. v. City of Durango.64, 130

K.

Kaler v. Campbell 25, 28, 52
Kaufman v. Griesemer 11
Kearney Canal & Water Supply Co. v. Akeyson 68
Keeney v. Carillo 33, 41, 51, 52
Kerr v. Dudley 103
Kidd v. Laird 72
King v. Miles City Irr. Ditch Co. 69
Kirk v. Bartholomew 52, 96
Kleinschmidt v. Greiser 48, 84, 97
Knoth v. Barclay.................................... 62, 66
Knowles v. Clear Creek P. R. Mill & Ditch Co. 50, 129
Knox v. Board Sup'rs, Los Angeles Co. 123
Krall v. U. S. 25, 26

L.

Lahman v. Hatch 139
La Junta & L. Canal Co. v. Ft. Lyon Canal Co. 103
La Junta & L. Canal Co. v. Hess.................................... 132
Lakeside Ditch Co. v. Crane 90, 97, 112, 123
Lamar Canal Co. v. Amity Land & Irr. Co.................... 40
Lamson v. Vailes 99
Landers v. Garland Canal Co....................................131
Lanning v. Osborne.................... 120, 131, 132, 133
Larimer Co. Ditch Co. v. Zimmerman 119
Larimer Co. Reservoir Co. v. People 36, 118, 120

Larimer & Weld Irr. Co. v. Wyatt........................ 121, 131
Larimer & Weld Reservoir Co. v. Cache La Poudre Irr. Co..113, 118
Last Chance Water Ditch Co. v. Heilbron.............. 90, 91, 94
Lavery v. Arnold 35, 81, 90, 92, 94
Learned v. Tangeman 17
Ledu v. Jim Yet Wa... 91
Lehi Irr. Co. v. Moyle 44, 54
Leonard v. Shatzer 113
Levy v. Salt Lake City 69
Lillis v. Emigrant Ditch Co. 115
Lincoln & Dawson Co. Irr. Dist. v. McNeal....................137
Lindsay Irr. Co. v. Mehrtens 4, 128
Lisonbee v. Monroe Irr. Co.................................. 69
Lobdell v. Hall 35
Lobdell v. Simpson 43, 52
Lorenz v. Jacob 4
Louden Irr. Canal Co .v. Handy Ditch Co........ 99, 100, 101, 105
Low v. Rizor 36, 47, 48, 60, 82
Low v. Schaffer 3, 54, 56, 57, 60, 80, 85, 86, 87
Lower Kings River Water Ditch Co. v. Kings River & Fresno
Canal Co. 72, 109
Lower Latham Ditch Co. v. Louden Irr. Canal Co..........94, 101
Lux v. Haggin..3, 4, 9, 11, 12, 14, 16, 17, 24, 25, 26, 28, 29, 32, 72,
78, 109, 114, 123, 127
Lytle Creek Water Co. v. Perdew 28, 61, 75, 111

M.

McBoom v. Thompson 81
McCarty v. Boise City Canal Co. 70
McCauley v. McKeig 117
McClellan v. Hurdle 33, 109
McCrary v. Beaudry 120, 131
McDermont v. Anaheim Union Water Co. 131
McDonald v. Bear River & Auburn Water Min. Co. 36
McDonald v. Lannen 80
McFadden v. Board Sup'rs Los Angeles County.......... 129, 133
McGhee Irr. Ditch Co. v. Hudson 25, 127, 128
McGinness v. Stanfield 95
McGuire v. Brown 28, 30, 46, 66, 84
McKinney v. Smith 45
McLear v. Hapgood 74, 79
McLure v. Koen 81, 97
McPhail v. Forney 44, 78, 79, 114

Mack v. Jackson 118
Madera Irr. Dist., In re 135, 136, 137, 139
Maeris v. Bicknell 45
Mahoney v. Neiswanger 50, 57
Malad Val. Irr. Co. v. Campbell 60
Mandell v. San Diego Land & Town Co. 131
Manning v. Fife 54, 58
Mathews v. Ferrea 93
Mayberry v. Alhambra Addition Water Co. 21, 94
Meagher v. Hardenbrook 45
Merrill v. Southside Irr. Co. 120, 130, 131
Messinger's Appeal 11, 88
Middle Creek Ditch Co. v. Henry 72, 77, 80, 85, 86
Miles v. Du Bey 107, 111
Miller v. Douglas 62, 66, 67, 115
Miller v. Highland Ditch Co. 111
Miller v. Miller 11, 16
Miller v. Perris Irr. Dist 137, 139
Millheiser v. Long 10, 37, 47, 52, 54, 55
Miner v. Gilmour 3, 11
Mitchell v. Patterson 136
Modoc Land & Live Stock Co. v. Booth 113
Montana Co. v. Gehring 117
Montrose Canal Co. v. Loutsenhizer Ditch Co. .. 53, 101, 104, 124
Moore v. Clear Lake Water Works 113, 115
Morrison v. Winn 82, 94
Moss v. Rose 48, 75, 85
Mott v. Ewing 113
Moyer v. Preston 10
Mud Creek Irr., Agr. & Mfg. Co. v. Vivian 2, 3, 25, 88, 90, 125
Munroe v. Ivie 125, 130
Murray v. Tingley 37, 39, 51

N.

Natoma Water & Min. Co. v. Hancock 54, 58, 67, 81, 90, 94
Neil v. Tolman 93, 96, 98
Nelson v. Clerf 74, 78
Nephi Irr. Co. v. Jenkins 95, 97
Nephi Irr. Co. v. Vickers 97
Nevada Ditch Co. v. Bennett 36, 37, 41, 46, 47, 51, 126
New Loveland & G. Irr. & Land Co. v. Consol. H. S. Ditch & R. Co. 118
New Mercer Ditch Co. v. Armstrong.. 45, 54, 82, 84, 101, 103, 126

Nichols v. Lantz 85
Nichols v. McIntosh........ 46, 54, 72, 75, 84, 87, 99, 101, 104, 121
Nippel v. Forker 66
North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.. 44, 117, 125
North Powder Milling Co. v. Coughanour 81, 90
Northern Colo. Irr. Co. v. Richards 131, 133

O.

O'Connor v. North Truckee Ditch Co. 131
Offield v. Ish 25, 36, 46, 47, 50, 57
Old v. Keener 68
Oneto v. Restano 90
Ophir Silver Min. Co. v. Carpenter 41, 51, 55
Oppenlander v. Left Hand Ditch Co... 6, 10, 50, 73, 79, 99, 101, 134
Osgood v. El Dorado Water & Deep Gravel Min. Co......26, 28
30, 37, 38, 41, 51, 52
Otero Canal Co. v. Fosdick 63
Oury v. Goodwin 4, 10, 62

P.

Paige v. Rocky Ford Canal & Irr. Co. 21, 43, 90
Painter v. Pasadena Land & Water Co. 33, 78
Palmer v. Dodd 14
Parker v. Larsen 68
Parks Canal & Min. Co. v. Hoyt 72
Patterson v. Brown & Campion Ditch Co. 64, 75
Pawnee Land & Canal Co. v. Jenkins 131
Paxton & Hershey Irr. Canal & Land Co. v. Farmers' & Merchants' Irr. & Land Co. 1, 4, 62, 63, 128
Peck Lateral Ditch Co. v. Pella Irr. Ditch Co.................. 104
People v. Farmers' High Line Canal & Reservoir Co.. 83, 85, 131
People v. Jefferds 137
People v. Linda Vista Irr. Dist. 137, 139
People v. Rogers 117
People v. Selma Irr. Dist. 137
People v. Turnbull 137
Peregoy v. McKissick 47, 113
Peregoy v. Sellick 116
Perry v. Otay Irr. Dist. 137, 139
Peterson v. Durkee 103
Platte Val. Irr. Co. v. Buckers Irr., Mill & Imp. Co.. 21, 33, 60, 109
Platte Water Co. v. Northern Colo. Irr. Co. 1, 26, 47, 85, 99

Platte & D. Ditch Co. v. Anderson 68
Pope v. Kinman 11
Posachane Water Co. v. Standart 93, 109
Power v. Switzer 45, 47, 97
Presbyterian College v. Poole 100
Prescott Irr. Co. v. Flathers 2, 128, 130
Price v. Riverside Land & Irr. Co. 131
Putnam v. Curtis 85, 87, 99

Q.

Quigley v. Birdseye 35, 72, 86
Quinlan v. Noble 62
Quint v. Hoffman 137, 139

R.

Raft River Land & Cattle Co. v. Langford 95
Ramelli v. Irish 45, 46, 50
Randall v. Silverthorn 11
Raymond v. Wimsette 113
Rhodes v. Whitehead 3, 9
Rialto Irr. Dist. v. Brandon 138, 139
Richardson v. Kier 68
Rigney v. Tacoma Light & Water Co. 9, 78, 94, 113, 114
Rio Grande Land & Canal Co. v. Prairie Ditch Co. 40, 103
Riverside Land & Irr. Co. v. Jansen 54
Riverside Water Co. v. Gage 9, 109
Riverside Water Co. v. Sargent 54, 97, 124
Roberts v. Arthur 109
Rockwell v. Highland Ditch Co. 118, 132
Rocky Ford Canal, etc., Co. v. Simpson 124, 131
Rodgers v. Pitt 96, 111
Roeder v. Stein 54, 56, 57
Rominger v. Squires 52, 75, 87
Ronnow v. Delmue 111
Rupley v. Welch 118
Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co. 132

S.

Saint v. Guerrerio 58, 109, 111, 112, 114, 115
Salazar v. Smart 40, 114, 115, 116
Salina Creek Irr. Co. v. Salina Stock Co. 54, 60, 61

Sample v. Fresno Flume & Irr. Co. 131, 132
Sampson v. Hoddinott 109, 113
San Diego Flume Co. v. Chase 132
San Diego Flume Co. v. Souther 4, 130, 132, 133
San Diego Land & Town Co. v. City of National City.......... 133
San Diego Land & Town Co. v. Sharp.................... 120, 131
San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County 130, 133
San Luis Land, Canal & Imp. Co. v. Kenilworth Canal Co.. 63, 128
San Luis Water Co. v. Estrada 46
Sand Creek Lateral Irr. Co. v. Davis 64
Santa Paula Water Works v. Peralta 35, 61, 75
Schilling v. Rominger.................... 52, 62, 75
Schulz v. Sweeney 43
Schwab v. Beam 53
Scott v. Toomey 28, 30
Sefton v. Prentice 81
Senate Resolution, In re....................118, 121
Senior v. Anderson 39, 48, 54, 90
Shepard v. Tulare Irr. Dist. 139
Shields v. Orr Extension Ditch Co. 68, 70
Shoemaker v. Hatch 66
Shotwell v. Dodge 56
Sieber v. Frink 46, 47, 51, 52, 85, 103
Sievers v. Garfield County Court 63
Silver Creek & Panoche Land & Water Co. v. Hayes.......... 109
Simmons v. Winters 25, 32, 43, 48, 54, 78
Simpson v. Williams 54
Slattery v. Harley 25
Sloan v. Glancy 85
Smith v. Corbit 3, 46, 78
Smith v. Denniff.................... 1, 25, 28, 29, 35, 73, 78, 86
Smith v. Green 81, 82
Smith v. Hawkins, ...28, 54, 55, 82, 83, 89, 90, 93
Smith v. Logan 35, 73, 83, 88, 110
Smith v. North Canyon Water Co....................75, 90, 92
Smith v. O'Hara 61, 80, 86
Smith v. Phillips.................... 97
Smith v. Stearns Rancho Co....................111, 115
Smyth v. Neal 41, 94
Snyder v. Murdock....................78, 134
South Boulder & R. C. Ditch Co. v. Marfell....................132, 133
South Yuba Water & Min. Co. v. Rosa.................... 28
Southern Pac. R. Co. v. Dufour.................... 33

Southwestern Land Co. v. Hickory Jackson Ditch Co........... 62
Spargur v. Heard..88, 113
Sparks Mfg. Co. v. Town of Newton.......................... 14
Sparlin v. Gotcher... 109
Springville v. Fullmer..............................45, 77, 110
Spurgeon v. Santa Ana Val. Irr. Co......................... 134
Stalling v. Ferrin... 82
Stanford v. Felt.................................9, 12, 19, 78
Stark v. Miller.. 26
State v. Brown... 139
State v. Marshall.. 141
State v. Wright.. 141
Stein Canal Co. v. Kern Island Irr. Canal Co.............52, 114
Steinberger v. Meyer....................................... 97
Sterling Irr. Co. v. Downer................................ 99
Stocker v. Kirtley......................................74, 117
Stowell v. Johnson......................................10, 61
Strait v. Brown.....................................33, 52, 60
Strickler v. City of Colorado Springs......45, 46, 52, 53, 60, 77, 79
Struby-Estabrook Merc. Co. v. Davis........................134
Strutt v. Bovingdon.. 11
Sturr v. Beck.. 30
Supply Ditch Co. v. Elliott............................124, 134
Sweetland v. Olsen......................................40, 78
Swift v. Goodrich...................................11, 94, 114
Sylvester v. Jerome..119

T.

Taughenbaugh v. Clark...............................41, 47, 48
Taylor v. Abbott....................................30, 32, 38
Thomas v. Blaisdell.. 68
Thomas v. Guiraud 1, 42, 45, 49, 50, 52
Thorp v. Freed... 25
Thorp v. Woolman... 121
Thorpe v. Tenem Ditch Co.......................25, 28, 30, 35, 124
Tolle v. Correth......................................2, 3, 25
Tolman v. Casey.....................................28, 93, 95
Toohey v. Campbell......................................35, 45
Townsend v. Fulton Irr. Ditch Co........................... 131
Toyaho Creek Irr. Co. v. Hutchins.......................62, 78
Trambley v. Luterman................................10, 45, 88
Travelers' Ins. Co. v. Childs.......................72, 78, 116

Tregea v. Owens.. 139
Tripp v. Overocker.................................62, 63, 64, 65
Tucker v. Jones.................................75, 78, 82, 85, 98
Turlock Irr. Dist. v. Williams........................135, 137, 139
Turner v. Cole 78, 85
Tynon v. Despain.......................................66, 81

U.

Ulbricht v. Eufaula Water Co.............................. 11
Umatilla Irr. Co. v. Barnhart............................4, 127
Umatilla Irr. Co. v. Umatilla Imp. Co..................37, 51, 114
Union Colony v. Elliott................................72, 99, 102
Union Mill & Min. Co. v. Dangberg..9, 11, 16, 26, 30, 59, 96, 98, 111
Union Mill & Min. Co. v. Ferris..3, 9, 11, 16, 17, 19, 20, 26, 27, 90, 93
United States v. Rio Grande Dam & Irr. Co..............23, 24, 34
United States Freehold Land & Emigration Co. v. Gallegos 114, 115
Upper Platt & B. Canal Co. v. Ft. Morgan Reservoir & Irr. Co 103
Utt v. Frey.....................................44, 82, 85, 87

V.

Van Bibber v. Hilton...................................... 18
Vansickle v. Haines...........................9, 10, 26, 29, 93
Vernon Irr. Co. v. City of Los Angeles...........9, 12, 25, 78, 90
Vinland Irr. Dist. v. Azusa Irr. Co......................... 33

W.

Walley v. Platte & D. Ditch Co............................ 68
Ward v. San Diego Land & Town Co.......................... 133
Ware v. Walker..28, 46, 67
Water Supply & Storage Co. v. Larimer & Weld Irr. Co..40, 41, 44, 51, 82, 101, 118
Water Supply & Storage Co. v. Larimer & Weld Reservoir Co. 58, 60, 118
Water Supply & Storage Co. v. Tenney..........94, 101, 118, 125
Watterson v. Saldunbehere...............................39, 111
Weiderkind v. Tuolumne County Water Co..................... 69
Weill v. Baldwin.. 81
Wells v. Kreyenhagen....................................37, 47
Wells v. Mantes... 39

Wells v. Price.... 134
West v. Taylor.... 32
West Point Irr. Co. v. Moroni & Mt. P. Irr. Ditch Co......112, 113
Western Irr. & Land Co. v. Chapman.... 131
Weston v. Alden....11, 16
Wheeler v. Northern Colo. Irr. Co....47, 52, 124, 126, 130, 131, 133
White v. Farmers' High Line Canal & Reservoir Co......120, 132
Wiggins v. Muscupiabe Land & Water Co........3, 18, 19, 21, 56
Wilcox v. Hausch 43
Wilkins v. McCue.... 93
Williams v. Harter....32, 78, 109, 111
Willow Creek Irr. Co. v. Michaelson.... 33
Wilmington Canal & Reservoir Co. v. Dominguez.... 128
Wilson v. Perrault.... 133
Wilterding v. Green....120, 131, 133
Wold v. May.... 79
Wood v. Etiwanda Water Co....25, 28, 93
Wood v. Lowney.... 80, 86
Woodruff v. Perry.... 139
Wright v. Platt Val. Irr. Co....126, 129, 130, 132
Wyatt v. Larimer & Weld Irr. Co....72, 126, 130, 131, 132

X.

X. Y. Irrigating Ditch Co. v. Buffalo Creek Irr. Co....103

Y.

Yeager v. Woodruff.... 62
Yocco v. Conroy.... 79
Yunker v. Nichols 62

INDEX.

[REFERENCES ARE TO SECTIONS.]

A.

ABANDONMENT,
posting second notice of appropriation not an, 37.
turning water into natural stream as, 43.
of ditch without that of water right, 46, 84.
delay in applying water construed as, 48.
right of riparian owner not lost by, 82.
right of appropriator lost by, 82.
easement in irrigating ditch lost by, 82.
water abandoned subject to new appropriation, 82.
distinguished from nonuser, 83.
what constitutes, 85.
mere nonuser not an, 85.
transfer of water right as, 86.
proof of, 87.

ABSORPTION,
loss of water by, 16, 20, 21, 105.
allowance for, 54.

ACCIDENT,
no loss of water right by delay in applying water caused by, 47.

ACEQUIAS,
law of in Arizona and New Mexico, 123.

ACKNOWLEDGMENT,
of conveyance of water rights not necessary between parties, 80.

ACTION,
for interference with water rights, 108.
for unlawful diversion of water,
where diversion is in another state, 26.
none where appropriator receives all the water he is entitled to, 60, 109.
the right to maintain, 109.
none unless diversion was unlawful, 109.
plaintiff's right must be invaded, 109, 113.
measure of damages, 109.
cause oi action arising in two counties, 109.
defenses to, 109.
bar of statute of limitations, 109.
joinder of actions and parties, 111.
against several defendants acting independently, 112.
proof of injury or damages, 113.
in equity, 114.
remedy by injunction, 114.
pleading, 115.
to quiet title to water rights, 116.
for pollution of water, 117.
for confirmation of bonds issued by irrigation district, 139.
ACTS OF CONGRESS,
act of 1866,
water rights recognized and confirmed by, 26.
prospective in operation, 26.
protection of, independent of state lines, 26.
operates as grant of water right, 28.
practical construction of, 29.
applies only to public domain, 29.
grants right of way over public land, 66.
act of 1870,
declares grants of land subject of vested water rights, 28, 66
simply declaratory for pre-existing law, 28.
act of 1891,
grants right of way over public land, 66.
for text of acts, see Appendix.
ADJUDICATION OF PRIORITIES,
general jurisdiction of courts, 95.
rules as to determination of quantity of water to be awarded, 96.
see "Quantity of Water."
the decree,

ADJUDICATION OF PRIORITIES—Cont'd.
rights of parties settled by, 95, 97.
court may enforce, 95.
remedy for violation of, 95.
must be certain and definite, 97.
must be consistent, 97.
in Colorado,
acts in relation to, 99.
definition of, 99.
acts not applicable out of state, 99.
any interested person entitled to be made a party, 99.
allegations of complaint, 99.
jurisdiction of courts, 100.
the decree, 101.
no definite decree for uncompleted ditch, 101.
parties enjoying benefits of decree bound thereby, 101.
decree as res judicata, 101.
decree prima facie correct as between different water districts, 101.
proceedings before referee, 102.
review and appeal, 103.
decree may be reopened within two years, 103.
sufficiency of petition for, 103.
mode of taking appeal, 103.
appeal must be taken within two years, 103.
duty of appellate court to examine evidence, 103.
independent action to determine priorities, 104.
criticism of Colorado system, 105.
in Wyoming,
acts in relation to, 106.
jurisdiction and duties of board of control, 106.
procedure, 106.
certificate of appropriation, 106.
act of 1891 constitutional, 106.
act retrospective, 106.
in Washington, Nebraska, Montana, Utah, and Oregon, 107.

ADVERSE USER,
water rights acquired by, 88, 93.
user must be adverse, 90.
what constitutes, 90.
statutory appropriation not necessary, 90.
mere construction of ditches not, 90.
user must be continuous, 91.

ADVERSE USER—Cont'd.
what constitutes interruption, 91.
proof of, 92.
between tenants in common, 92.
none as against United States, 93.
when begins to run as against grantee of public land, 93.

ALIEN,
may appropriate water, 35.
may take or convey water right from or to citizen, 35.
grant of water right to, not abandonment of right, 86.

AMENDMENTS,
of pleadings in actions for unlawful diversion, 115.

ANSWER,
in action for unlawful diversion, 115.

APPEAL,
see "Adjudication of Priorities."

APPLICATION,
for permit to appropriate water, 122.

APPLICATION OF WATER (By Appropriator),
water must be applied to beneficial use within reasonable time, 47.
what is reasonable time, 47.
true test of appropriation, 47, 49.
gradual application through successive seasons, 48.
mode of, immaterial, 49.
place of, immaterial, 50.
water may be carried over intervening ridge, 50.
change of place of, 50.
use of water on wrong land by mistake, 50.

APPORTIONMENT,
of water by periods, 18.

APPROPRIATION,
origin of doctrine of, 6, 23.
water right may be acquired by, 22.
water of natural streams subject to, 22.
constitutionality of statutes authorizing, 24.
to what lands doctrine of, applicable, 25.
on the public domain, 26.

APPROPRIATION—Cont'd.
unappropriated water subject to, 28.
right of, on private land, determined by state law, 28, 29.
as against patentee of land, 28-30.
water of natural streams subject to, 31.
of percolating waters, 33.
of subterranean waters, 33.
of water of navigable streams, 34.
who may appropriate water, 35.
defined, 36.
elements of, 36.
how made, 36-51.
notice of, see "Notice of Appropriation."
map and statement of, see "Declaration;" "Map."
by taking water from ditch belonging to another, 44.
cannot be constructive, 47.
true test of, 47, 49.
right acquired by, 52-61.
by irrigation company, 126.
see "Application of Water;" "Appropriator;" "Diversion of Water."

APPROPRIATOR,
relative rights of, and grantee of public land, 28-30.
need not have title to land, 35.
right of, relates back to commencement of work of appropriation, 51.
right of, measured by extent of appropriation, 54.
right of, limited to amount of water actually needed or used, 54, 55, 57, 58.
right of, fixed by extent of appropriation, 59.
cannot extend or enlarge use, 59.
right of, depends on user, 61, 82.
not a purchaser within recording acts, 80.
cannot claim specific water flowing in channel, 109.
see, also, "Appropriation."

APPURTENANCE,
right of riparian owner to use water is not, 12.
water rights as, 72, 73.
water right when an, passes with conveyance of land, 78.
shares of stock in irrigation company not, 134.

ARID REGION,
defined, 2.

ARID REGION—Cont'd.
necessity for irrigation in, 2.
judicial notice of, what territory is embraced in, 25.
reclamation of, under federal and state statutes, 140, 141.

ARIZONA,
common law abolished in, 10.
public acequias in, 123.
see statutes in Appendix.

ARTIFICIAL CHANNEL,
no riparian rights in, 21, 109.

ARTIFICIAL INCREMENT,
of stream, belongs to person developing it, 21.

ARTIFICIAL WANT,
irrigation as an, 3, 53.

ASSESSMENT,
of damages for right of way, 65.
by irrigation districts, 139.

ASSIGNEE,
of water right, may maintain action for diversion of water, 110.

B.

BANKS,
necessary to constitute watercourse, 32.
of streams, right of appropriator to, 67.

BED OF STREAM,
right of appropriator to, 67.
removal of obstructions from, 67.
use of, as reservoir, 118.

BENEFICIAL USE,
see "Application of Water."

BOARD OF CONTROL,
in Wyoming, 106, 122.

BOARD OF LAND COMMISSIONERS,
in Colorado, to regulate distribution of water from state canals, 121.
to select lands, etc., under Carey grant, 141.

BONDS,
accompanying petition for organization of irrigation districts, 136.
of irrigation districts, 139.

BRIDGES,
over ditches crossing highways, 71.

BURDEN OF PROOF,
that land was public, 25.
of negligence in maintenance of ditch, 68.
that water right is appurtenant, 73.
of abandonment, 88.
of ouster of cotenant, 92.
that no more water was taken from stream than turned in, 109.
of title to riparian land, 116.

BY-LAWS,
see "Irrigation Companies."

C.

CALIFORNIA,
common law obtains in, 10.
doctrine of appropriation originated in, 23.
water commissioners in, 123.
irrigation districts in, 135.
see statutes in Appendix.

CANALS,
see "Ditches and Canals."

CANYON,
appropriation of water from, 31, 32.

CAPACITY OF DITCH,
as determining extent of appropriation, 55, 96.
how determined, 96.

CAREY ACT,
text of, 140.
acceptance of grant by states, 141.

CERTIFICATE OF APPROPRIATION,
appropriator to receive, 101, 106.

CHANGE,
of use to which water is put, 45, 77.
of point or means of diversion, 46.
of place of use, 50.

CHANNEL,
watercourse must have definite, 32.
see, also, "Natural Channel."

CITY,
when required to bridge ditches in streets, 71.
may purchase right of irrigation for municipal purposes, 77.
may maintain action for diversion of water, 110.
regulation and control of irrigation by, 123.
may be included within irrigation district, 136.

COLLATERAL ATTACK,
organization of irrigation district not subject to, 137.

COLORADO,
common law not in force in, 10.
see, also, "Adjudication of Priorities;" "Constitutional Law;" "Public Control of Irrigation."
see statutes in Appendix.

COMMON LAW,
right to use water for irrigation at, 9, 11.
in what states in force, 10.
inapplicable in mining regions, 23.

COMPLAINT,
in adjudication proceedings in Colorado, 99.
in action for unlawful diversion of water, 115.
in action by irrigation company to condemn water rights and land, 127.

CONDEMNATION,
of right of way for ditches, etc., 4, 62-65, 128, 138.
of riparian rights, 12, 127, 128.

CONFIRMATION ACT,
for confirmation of bonds issued by irrigation districts, 139.

CONGRESS,
see "Acts of Congress."

CONSTITUTIONAL LAW,
constitutionality of statutes authorizing appropriation, 24.
Colorado "map and statement law" unconstitutional, 40.
Colorado statute authorizing the enlargement of private ditches unconstitutional in part, 64.
Wyoming adjudication act constitutional, 106.

CONSTITUTIONAL LAW—Cont'd.
Colorado statute providing for superintendents of irrigation constitutional, 121.
Montana act accepting grant made by Carey act constitutional, 141.

CONSTRUCTIVE APPROPRIATION,
no such thing as, 47.

CONSUMERS,
right to continue purchasing water from company's ditch, 131.
may enjoin company from furnishing water to others so as to compel prorating, 131.
must make seasonable application for water and tender price, 131.
see, also, "Irrigation Companies."

CONTRACTS,
right to use of water may be acquired by, 81.
for water rights, within statute of frauds, 81.
with irrigation companies,
construction of, 132.
to furnish water in excess of company's ability illegal, 132.
permitting consumer to take water from ditch, illegal, 132.
decisions of state courts as to validity of, binding on federal courts, 132.
cancellation of, by court of equity, 132.

CONTRIBUTORY NEGLIGENCE,
doctrine of, applied to actions for damages from ditches, 70.

CONVEYANCE,
see "Transfer."

CORPORATIONS,
see "Irrigation Companies;" "Irrigation Districts."

COTENANCY,
see "Tenants in Common."

COUNTY COMMISSIONERS,
to appoint or constitute water commissioners, 123.
to fix water rates, 133.

COUNTY COURT,
in Colorado has concurrent jurisdiction with district court proceedings, 62.

CUSTOMS,
see "Local Customs;" "Miners' Customs."

D.

DAMAGES,
assessment of, in condemnation proceedings, 65.
none for mere existence of ditch, 68.
liability for, caused by construction and use of ditches, 68, 69.
liability of ditch companies for, 69.
measure of, in action for unlawful diversion, 109.
liability for, caused by reservoirs, 119.
measure of, for failure of irrigation company to furnish water, 131.

DECLARATION,
of appropriation to be filed for record, 40.

DECREE,
see "Adjudication of Priorities."

DEEDS,
water rights and ditches conveyed by, 80.
valid between parties, though not acknowledged or recorded, 80.

DEFENSES,
to action for unlawful diversion of water, 109.

DEFINITIONS,
irrigation, 1.
water right, 1.
arid region, 2.
subhumid region, 2.
farming neighborhood, 4.
riparian lands, 14.
riparian owner, 14.
appropriation, 36.
domestic use, under Colorado constitution, 53.
adjudication of priorities, in Colorado, 99.

DESERT LAND ACTS,
text of federal acts, 140.
the state statutes, 141.

DILIGENCE,
see "Reasonable Diligence."

DIRECTORS OF IRRIGATION DISTRICTS,
powers and duties of, 138.

DISTRICT COURT,
jurisdiction of adjudication proceedings in Colorado, 100.
in Idaho to fix water rates, 133.

DISTRICTS,
see "Irrigation Districts;" "Water Districts."

DITCH COMPANIES,
see "Irrigation Companies."

DITCHES AND CANALS,
use of natural channel or ravine as, 43.
use of, belonging to or constructed by another, 44.
only one ditch when practicable, 63.
enlargement of, belonging to another, 64.
liability for damages caused by, 68, 69.
to be bridged where crossing highways, 71.
property in, 74.
part of land, 74.
ownership of, distinct from ownership of water right, 74.
repair of, by tenants in common, 75.
destruction of, measure of damages, 74.
injury to, misdemeanor, 74.
action to protect, 74, 108.
taxation of, 76.
abandonment of, 84.

DIVERSION OF WATER,
point of, by riparian owner, 20.
within reasonable time essential to appropriation, 41.
what is reasonable time for, 41.
modes of, immaterial, 42.
means of, should be economical, 42, 54, 56, 58.
use of natural channel or ravine for, 43.
use of ditch belonging to or constructed by another, 44.
must be with intent to apply water to beneficial use, 45.
see, also, "Action."

DIVISION,
see, "Water Divisions."

DRAINAGE,
diversion of water for purpose of, not an appropriation, 45.

E.

EASEMENT,
right of riparian owner not an, 12.
over private lands, 62.
over public lands, 66.
to enter upon land of another, 67.
secondary, 67.
see, also, "Right of Way."

EJECTMENT,
will not lie to recover watercourse, 114, note.

ELECTION,
of officers to control acequias, 123.
to decide upon organization of irrigation district, 136.
of officers of irrigation district, 136.
to decide upon issuance of bonds by irrigation district, 139.

EMINENT DOMAIN,
general rules as to exercise of right of, 4.
state may appropriate water under right of, 24, note.
see, also, "Condemnation;" "Right of Way."

ENLARGEMENT,
of ditch belonging to another, 44, 64.
of use of water appropriated, 48, 59.

ENTIRE FLOW OF STREAM,
right of riparian proprietor to consume, 3, 17, 18
right of appropriator to consume, 57.

ENTRY, RIGHT OF,
for changing point of diversion, 66, 67.
for construction and maintenance of ditch, 67.
for removal of obstructions from stream, 67.

EQUITY, COURT OF,
jurisdiction of, to adjudicate priorities, 95.
may refer cause to master, 95.
may prescribe mode of measuring water, 95.
jurisdiction of, in actions for interference with water rights, 114.
may restrain filling of reservoir, 119.

ESTOPPEL,
by license to divert water, 81.
water rights may be lost by, 94.
mere acquiescence in diversion does not result in, 94.
to question validity of decree in adjudication proceedings, 101.

EVAPORATION,
loss of water by, 16, 20, 21.
allowance for, 54.

F.

FARMING NEIGHBORHOOD,
term defined, 4.
supplying water to, public use, 4.

FEDERAL COURT,
suit in, to enjoin diversion of water in another state, 26.
decisions of state court as to validity of irrigation contracts, binding on, 132.
construction of, of acts confirming bonds of irrigation districts not binding on state courts, 139.

FORFEITURE,
not favored, 87.
see, also, "Abandonment;" "Adverse User;" "Estoppel."

FREEHOLD ESTATE,
water right is, 72, 103, note.

G.

GRANT,
see "Transfer."

GREAT BRITAIN,
necessity for irrigation in, 1, 5.
common law in force in, 10.

H.

HEADGATE,
may be closed by water commissioner, 121, 122.

HIGHWAYS,
ditches crossing, to be bridged, 71.

I.

IDAHO,
common law not in force in, 10.
public control of irrigation in, 123.
see statutes in Appendix.

ILL HEALTH,
of appropriator, no excuse for delay in diverting water, 41.

INCH,
see "Miners' Inch."

INCREASE,
right to increase extent of original appropriation, 48.

INDEPENDENT ACTION,
for determination of priorities, 104.

INDIAN,
appropriation by, 35.

INJUNCTION,
to restrain unlawful diversion of water, 109, 111, 113, 114.
to restrain filling of reservoir, 119.

INTENT,
diversion of water must be with intent to apply to beneficial use, 45.
abandonment a question of, 85.

INTERNAL IMPROVEMENTS,
public reservoirs are, 118.
state canals and reservoirs are, 121.
ditches and canals of irrigation company may be, 128, note.

INTERRUPTION,
of adverse user, 91.

IRRIGATION,
defined, 1.
necessity for, 2, 5.
natural or artificial want, 3, 53.

IRRIGATION COMPANIES,
distribution of water by, a public use, 4, 127, 128.
liability of, for damage caused by ditches, 69.
one company may succeed to rights of another, 97.
necessity for, 124.
classes of, 124.
private companies, 124.
organization of, 124.
mutual ditch companies,
nature of, 124.
relation between company and members one of contract, 124.
shares of stock in, 124.
stock assessable, 124.

IRRIGATION COMPANIES—Cont'd.
are trustees for stockholders and consumers, 124.
may maintain action, 124.
acquisition of water rights by, 125.
grants of water rights to, by legislature, 125.
power of, to purchase water rights, can be questioned only by state, 125.
appropriation of water by,
ditch company may appropriate water, 126.
subject to ordinary rules of law as to appropriation, 126.
ditch company agent of consumer, 126.
ditch company not proprietor of water diverted by it, 126.
condemnation of water rights by, 127.
condemnation of right of way by, 128.
power of, to condemn land, may include power to condemn water rights, 127, 128.
by-laws,
ditch company may adopt reasonable by-laws and regulations, 129.
must be in accordance with law, 129.
cannot deprive consumer of his constitutional rights, 129.
providing that water be sold to stockholders only, 129.
are private corporations, 130.
are public carriers of water, 130.
subject to public control, 130, 133.
duty of, to furnish water to consumers, 131.
see "Consumers."
delivery of water may be compelled by mandamus, 131.
see "Mandamus."
liability of, for failure to furnish water, 131.
contracts for water, 132.
see "Contracts."
rates for water, 133.
see "Water Rates."

IRRIGATION DISTRICTS,
California act relating to, constitutional, 4, 135.
statutes relating to, passed in several states, 135.
how organized, 136.
proceedings for organization of, liberally construed, 136.
inclusion and exclusion of land, 136.
town or city may be included in, 136.
public land may be included in, 136.

IRRIGATION DISTRICTS—Cont'd.
election of officers of, 136.
not municipal corporations, 137.
are public corporations, 137.
organization of, not subject to collateral attack, 137.
cannot be dissolved by courts, 137.
laches may be imputed to, 137.
powers and duties of board of directors, 138.
may sue and be sued, 138.
issue of bonds, 139.
levy of assessments, 139.
judicial confirmation of issue and sale of bonds, 139.
judgment of court conclusive, 139.

IRRIGATION LAW,
rise and growth of, 5.
two systems of, 6.
of Colorado does not change common-law doctrine as to other uses of water, 53.

J.

JOINDER OF ACTIONS,
in actions for diversion of water, 111.

JOINDER OF PARTIES,
in actions for diversion of water, 111.

JUDICIAL NOTICE,
of necessity for irrigation, 2.
of what territory is arid, 25.
of local customs, laws, and decisions, 27.

JURISDICTIONS,
of federal government over public domain, 26.
of federal government over navigable streams, 24, 34.
see "County Court;" "District Court;" "Equity."

JURY,
right to in equitable actions, 114, 117.

L.

LACHES,
may be imputed to irrigation district, 137.

LAKE,
appropriator from stream issuing from, protected, 60.

LESSEE,
of reservoir, liable for damages caused by it, 119.
see, also, "Tenant."

LICENSE,
parol license to divert water ordinarily revocable, 81.
not revocable when acted on, 81.

LOCAL CUSTOMS, LAWS AND DECISIONS,
right of appropriation on public land established by, 26, 27.
judicial notice of, 27.

M.

MANDAMUS,
will not lie to compel irrigation officer to close headgates, 121.
delivery of water by irrigation company may be compelled by, 131.
petition for, 131.
not appropriate remedy to secure perpetual right to water, 131.

MAP,
of ditch, etc., to be filed for record, 40, 122.

MASTER,
court of equity may refer cause to, 95.

MAXIMS,
aqua currit et debet currere, ut currere solebat, 9, note.
de minimis non curat lex, 9, note.
sic utere tuo ut alienum non laedas, 68, note.

MEANS,
of diverting and conducting water immaterial, 1.

MEASUREMENT OF WATER,
court of equity may prescribe method of, 95.
reasonable approximation to accuracy in, should be aimed at by court, 96.
unit of, 97.
by state engineer in Wyoming, 106.
by state engineer in Colorado, 121.

MECHANICS' LIENS,
on ditches and canals, 74.

MEXICAN LAW,
law of Arizona and New Mexico founded on, 123.

MINERS' CUSTOMS,
appropriation under, 23.

MINERS' INCH,
as unit of measurement of water, 97.

MONTANA,
adjudication of priorities in, 107.
acceptance of grant made by Carey act, 141.
see statutes in Appendix.

MUNICIPAL CORPORATIONS,
irrigation districts as, 136.

MUTUAL DITCH COMPANIES,
see "Irrigation Companies."

N.

NATURAL CHANNEL,
may be used as part of ditch, 43.

NATURAL OVERFLOW,
irrigation by, 1, 49.

NATURAL WANT,
irrigation as, 3, 53.
to be preferred to other wants, 3.
consumption of entire flow of stream for, 17.

NAVIGABLE STREAMS,
federal control of, 24, 34.
appropriation of water of, 34.

NEBRASKA,
appropriation acts unconstitutional, 24.
common law in force in, 24, note.
adjudication of priorities in, 107.
public control of irrigation in, 123.
see statutes in Appendix.

NEGLIGENCE,
liability for damages from ditches caused by, 68, 69.
burden of proving, 68.
proof of, not required in action for damage from reservoir, 119.

NEVADA,
common law not in force in, 10.
public control of irrigation in, 123.
see statutes in Appendix.

NEW APPROPRIATION,
appropriator may make, 59.

NEW MEXICO,
common law not in force in, 10.
public acequias in, 123.
see statutes in Appendix.

NONUSER,
right of riparian owner not lost by, 12, 82.
right of appropriator lost by, 82.
must continue for prescriptive period, 83.
see, also, "Abandonment."

NORTH DAKOTA,
common law in force in, 10.
see statutes in Appendix.

NOTICE OF APPROPRIATION,
posting of, required in some states, 37.
as evidence, 37.
posting of second notice not abandonment of original right, 37.
what is sufficient notice, 38.
object of, 39.
appropriation without posting of, 39.
strict compliance with statute relating to, required, 51.

NUISANCE,
irrigating ditch not necessarily a, 68.
pollution of water as, 117.

O.

OBSTRUCTIONS,
right to increased flow of water caused by removal of, 43.
right of entry for removal of, from bed of stream, 67.
court of equity may require removal of, 114.

OREGON,
common law in force in, 10.
adjudication of priorities in, 107.
see statutes in Appendix.

P.

PAROL,
transfers of ditch or water right, 80.
license to use water, 81.

PATENTEE,
relative rights of appropriator on public land, and of, 28-30.
of public land, rights relate back to inception of title, 30, 93.

PERCOLATING WATERS,
ordinarily not subject to appropriation, 33.
may be appropriated when collected in an underground stream, 33.
when presumed to augment flow of stream, 60.

PERCOLATION,
unlawful diversion by means of, 109.

PERIODS,
apportionment of water by, 18.
use of water by, 61.

PERSONAL PROPERTY,
water as, 72.
stock in irrigation company is, 134.

PETITION,
for reargument of adjudication of priorities in Colorado, 103.
for writ of mandamus to compel delivery of water by irrigation company, 131.
for organization of irrigation district, 136.

PLACE,
of application of water, 50.
may be changed, 50.

PLEADINGS,
in action for unlawful diversion of water, 115.
in action to quiet title to water rights, 116.

POLLUTION OF WATER,
action for, 117.
as nuisance, 117.

POVERTY,
of appropriator no excuse for delay in diverting water, 41.

PRE-EMPTOR,
of land in possession may maintain action for diversion of water, 110.

PRESCRIPTION,
riparian rights lost or acquired by, 12, 13.

PRESCRIPTION—Cont'd.
acquisition of water right by appropriation and by prescription contrasted, 89.
how pleaded, 115.
see, also, "Adverse User."

PRIORITY,
origin of doctrine of, 23, 52.
as between appropriator and settlers on or grantees of public land, 28-30.
of appropriation confers superiority of right, 52.
as between appropriators using water for different purposes, 53.
as between several appropriators using same ditch, 75.

PRIVATE CORPORATIONS,
irrigation companies are, 130.

PRIVATE LAND,
right to appropriate water on, determined by law of state, 28.

PRIVATE USE,
use of water for irrigation as, 4, 62.
taking of private property for, 4.

PRORATING ACT,
in Colorado, 121.

PUBLIC CARRIERS,
irrigation companies are, 130.

PUBLIC CONTROL OF IRRIGATION,
irrigation subject to state control, 120.
Colorado system, 121.
Wyoming system, 122.
in Nebraska, 123.
in Washington, 123.
in Nevada, 123.
in Idaho, 123.
in California, 123.
public acequias in Arizona and New Mexico, 123.
municipal control in Utah, 123.

PUBLIC CORPORATIONS,
irrigation districts are, 137.

PUBLIC DOMAIN,
what constitutes, 26.
see, also, "Public Land."

PUBLIC LAND,
burden of proving land public on appropriator, 25.
power to control and dispose of, vested in United States, 26.
acquisition of water rights on, 26.
grant of, carries common-law rights in streams, 26, 28.
how existence of water rights on is determined, 27.
grant of, subject to vested water rights, 28, 29.
right of way over, 66.
may be included in irrigation district, 136.

PUBLIC USE,
use of water for irrigation as, 4, 62, 126.

PUMPS,
may be used to raise water, 14, 42.

PURPOSE,
appropriation must be for useful, 45.
of appropriation may be changed, 45, 77.

Q.

QUANTITY OF WATER,
that may be claimed by riparian owner, 15-18.
that may be claimed by appropriator, 54, 56-59.
how far determined by capacity of ditch, 55, 96.
determination of, in adjudication proceedings, 96, 101.

QUIET TITLE, ACTION TO,
to water rights, 116.

R.

RATES,
see "Water Rates."

RAVINE,
when does not constitute watercourse, 32.
use of, as part of ditch, 43.

REALTY,
water right is, 72, 116.

REASONABLE DILIGENCE,
work of diversion must be prosecuted with, 41.
required in application of water to beneficial use, 47.

REASONABLE TIME,
diversion of water within, 41.
water to be applied within, 47.

REASONABLE USE,
what is a, of water by riparian owner, 16.
consumption of entire flow of stream by riparian owner, not, 17.
what is, by appropriator, 54, 56, 57.
bearing of point of diversion or return on, 20.

REFEREE,
proceedings before, in Colorado, under adjudication acts, 102.

RELATION, DOCTRINE OF,
how affected by statutes requiring notice of appropriation, 39.
right of appropriator relates back to commencement of work, 51.

REMEDIES,
see "Action."

REPAIR,
ditches must be kept in, 68.

REPAIRS,
liability for, on enlarged ditch, 64.
liability of cotenants for, 75.

RES JUDICATA,
doctrine of, in adjudication proceedings, 98, 101.

RESERVOIRS,
right to construct, 118.
when public, are internal improvements, 118, 121.
use of natural depression or bed of stream as, 118.
liability of owner of, for damages caused by, 119.

REVIEW,
see "Adjudication of Priorities."

RIGHT OF WAY,
for ditches, etc., how acquired, 62.
condemnation of, 4, 62.
right of condemnation limited, 63.
shortest route to be taken, 63.
assessment of damages, 65.
over public lands, 66.
acquisition of, by irrigation companies, 128.
acquisition of, by irrigation district, 138.

RIPARIAN LANDS,
riparian rights confined to, 13.
defined, 14.

RIPARIAN PROPRIETOR,
may use water for irrigation, 9, 11.
has no property in water of stream, 9, 16.
equality of rights of several proprietors, 9, 16, 18.
who is a, 14.
use of water by, must be reasonable, 15.
cannot use water to material injury of lower proprietor, 16, 17.
right of, measured by necessity, 18.
right of, not measured by quantity of water appropriated or used, 18.
right of, must be exercised with due regard to rights of others, 18.
relative rights of several proprietors, 18.
right of, is property, 24.
cannot be deprived of vested rights by state, 24, 125.
see, also, "Riparian Rights."

RIPARIAN RIGHTS,
doctrine of, basis of one system of irrigation law, 6.
statement of doctrine of, 9.
in what state doctrine of in force, 10.
more liberal doctrine of, as to irrigation in arid than in moist regions, 11, 16.
not easements or appurtenances, 12.
annexed to soil, 12, 13, 18.
not dependent on user, 12, 18, 82.
may be lost, 12.
grant of, 12, 13.
condemnation of, 12.
lost by prescription, 12, 13.
limited to riparian lands, 13.
do not extend to one not a riparian owner, 13.
may be severed from land by grant, condemnation or prescription, 79.
transfer of, 78, 79.
see, also, "Riparian Proprietor."

ROYALTY,
exaction of, by irrigation companies for water, illegal, 133.

S.

SALE,
see "Transfer."

SETTLERS ON PUBLIC LAND,
rights protected as against appropriator, 30.
see, also, "Patentee."

SOUTH DAKOTA,
see statutes in Appendix.

SPECULATION,
water may not be diverted for purpose of, 45.

SPRINGS,
waters of, may be appropriated, 32.
wrongful diversion of water from, 60.

STATE,
may authorize appropriation of water, 24.
cannot deprive riparian owner of vested rights, 24, 125.
cannot destroy right of United States to flow of water on public domain, 24, 26.
power of, as to navigable waters, 24.
may appropriate water under power of eminent domain, 24, note.
irrigation subject to control of, 120.

STATE CANALS AND RESERVOIRS,
construction of, in Colorado, 121.
are internal improvements, 121.

STATE ENGINEER,
duties of, in Colorado, 121.
duties of, in Wyoming, 106, 122.

STATE LANDS,
appropriation of water on, 25.

STATEMENT,
of appropriation to be filed, 40.
in adjudication proceedings, 99, 103.

STATUTE OF FRAUDS,
agreement to convey water right within, 80.
contracts affecting water rights within, 81.

STATUTE OF LIMITATIONS,
bar to action for unlawful diversion of water, 109.
see, also, "Adverse User."

STATUTES,
for compilation of, see Appendix.

STOCK,
in mutual companies represents water rights, 124, 134.

STOCK—Cont'd.
in mutual companies assessable, and may be sold when delinquent, 124.
transfer of, as transfer of water rights, 134.
shares of, not appurtenant to land irrigated, 134.
attachment or execution sale of, 134.
transfer as personal property, 134.

STOCKHOLDERS,
irrigation company trustee for, 124.
in mutual ditch company may enjoin sale of water to nonstockholders, 131.
liability of company to for permitting excessive diversion of water by other stockholders, 131.

STORAGE OF WATER,
irrigator cannot divert for storage to prejudice of prior appropriator, 59.
the right to store water, 118.
law of appropriation applicable to, 118.
see, also, "Reservoirs."

STREAMS,
water of, subject to appropriation, 31.
water may be turned into and taken from, 43.
see, also, "Natural Streams;" "Watercourse."

SUBHUMID REGION,
defined, 2.

SUBTERRANEAN STREAMS,
water of may be appropriated, 33.

SUCCESSIVE APPROPRIATIONS,
of surplus water, 58.
of water by persons using same ditch, 75.

SUIT,
see "Action."

SUPERINTENDENTS OF IRRIGATION,
to be governed by decrees in distributing water, 101.
in Colorado, 121.
in Wyoming, 122.

SURPLUS WATER,
must be returned to stream by riparian owner, 19.
manner of return of, immaterial, 19.

SURPLUS OF WATER—Cont'd.
point of return of, 20.
appropriator has no interest in, 58.
subject to appropriation, 58.
must be returned to stream, 58.

T.

TAXATION,
of ditches and water rights, 76.

TENANT,
in possession of land may appropriate water, 35.
for years may enjoin unlawful diversion of water, 110.

TENANTS IN COMMON,
may agree to use water by periods of time, 61.
of ditches and water rights, 75.
duty to repair ditch, 75.
possession of one not presumed adverse to cotenants, 75, 92.
one may preserve right for all, 85.
possession of one that of all, 92.
adverse user between, 92.
may, but need not, join in action for diversion of water, 111.

TEST,
of appropriation is application of water to beneficial use, 49.

TEXAS,
irrigation, natural use of water in arid portions of, 3.
common law in force in, 10.
doctrine of appropriation applicable to arid portions of state, 25.
see statutes in Appendix.

TITLE,
of patentee relates back, 30, 93.
to land not necessary to support appropriation, 35.

TOWN,
may be included in irrigation district, 136.

TRANSFER,
of water rights and ditches, 77-81.
sale may be for different use, 77.
incipient rights may be transferred, 77.
of water rights with land, 78.
of water rights separate from land, 79.
of water rights must ordinarily be by deed, 80.

TRANSFER—Cont'd.
verbal transfer, when sufficient, 80.
acknowledgment or record of, not necessary between parties, 80.
of water right as abandonment, 86.
of stock in ditch companies, 134.

TRESPASSER,
no valid appropriation by, 35.
effect of use of water by, on question of appurtenance, 73.

TRIBUTARIES,
right of appropriator from stream to flow of, 60.

U.

UNITED STATES,
control of, over navigable streams, 24, 34.
property of, in streams on public land, 26.
right to appropriate water on public domain derived only from, 26.
see "Acts of Congress."

UNLAWFUL DIVERSION OF WATER,
see "Action."

USE,
natural or artificial, 3.
relative importance of several uses of water, 3, 53.
of water by riparian proprietor, 9, 11.
right of appropriator dependent on, 54, 61, 82.
of water may be changed, 45, 77.
see, also, "Application of Water."

UTAH,
common law not in force in, 10.
adjudication of priorities in, 107.
municipal control of irrigation in, 123.
see statutes in Appendix.

W

WASHINGTON,
adjudication of priorities in, 107.
public control of irrigation in, 123.
see statutes in Appendix.